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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1905

SEA ISLAND BROADCASTING CORPORATION OF S.C.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Sea Island Broadcasting Corporation of S.C. respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on January 14, 1980.

OPINIONS BELOW

The judgment and opinion of the court of appeals, not yet officially reported, appear as Appendix A of this petition. The Report of the Federal Communications Commission on limited remand from the court of appeals, reported at 69 F.C.C. 2d 1796 (1978), appears as Appendix B. The Decision of the Federal Com-

munications Commission, reported at 60 F.C.C. 2d 146 (1976), and its Memorandum Opinion and Order denying reconsideration, reported at 64 F.C.C. 2d 721 (1977), appear as Appendices C and D respectively. The Initial Decision of Administrative Law Judge Chester F. Naumowicz, Jr., reported at 61 F.C.C. 2d 937 (1975), appears as Appendix E.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1980. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 5, 1980. This petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1976).

QUESTION PRESENTED

Upon holding, for the first time, that the Federal Communications Commission was required to apply a clear and convincing standard of proof in broadcast license revocation proceedings, whether the court of appeals exceeded its powers of review in affirming a Commission revocation order reached under a mere preponderance of the evidence standard of proof.

STATUTES AND RULES INVOLVED

This case involves Sections 7 and 10(e) of the Administrative Procedure Act, as amended, 5 U.S.C. §§ 556 and 706 (1976); Section 312 of the Communications Act of 1934, as amended, 47 U.S.C. § 312 (1976); and 47 C.F.R. § 73.1205 (1975) (amended 1976). These provisions are set forth in Appendix I.

STATEMENT OF THE CASE

This case concerns the Decision of the Federal Communications Commission (Commission or FCC) to revoke the license of Sea Island Broadcasting Corporation of S.C. (Sea Island) to operate AM radio station WSIB, Beaufort, South Carolina. Pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b), Sea Island appealed the Commission's Decision to the Court of Appeals for the District of Columbia Circuit. On appeal, Sea Island argued and the court held that the Commission must find clear and convincing evidence of wrongdoing in order to revoke a broadcast station license. A mere preponderence of the evidence would not be enough. However, even though the Commission admittedly did not apply the higher standard in reaching its Decision (App. 14a), and in fact resisted its imposition (App. 14a-18a), the court affirmed the Commission's order revoking the WSIB license. The only basis for such affirmance was the Commission's *post hoc* representation on limited remand that the same finding of wrongdoing would have been made had the Commission used the clear and convincing standard. (App. 14a n.3).

In its Petition for Rehearing and Suggestion for Rehearing *En Banc,* Sea Island urged the court to remand the case for a second time, and to require the FCC to reconsider it fairly under the higher standard of proof the court had imposed. Rehearing and rehearing *en banc* were denied without comment. (App. 47a-48a).

Before the Commission, Sea Island urged that a higher standard of proof than a mere preponderance of the evidence must be applied in an administrative adjudication where the potential consequences are as serious as the revocation of a broadcast station license. Sea Island relied upon this Court's decision in *Woodby*

v. *Immigration and Naturalization Service,* 385 U.S. 276 (1966), a deportation case. The Commission rejected the argument, stating in its Decision that Sea Island's reliance on *Woodby* was misplaced:

> In *Woodby* the Supreme Court adopted the stricter standard of "clear, unequivocal and convincing" proof because the statute was silent as to the degree of proof required at the administrative level . . . . Unlike a deportation case, the Administrative Procedure Act is applicable here and specifies the degree of proof required at the administrative level for imposition of a sanction. The pertinent provisions of Section 556(d) of the APA clearly require only that a Commission decision be "supported by and in accordance with the reliable, probative, and substantial evidence" of record. (App. 28a)(footnote omitted).

This statement was the source of two of the issues on appeal: First, whether the Commission had determined that the standard of proof required was merely "reliable, probative and substantial evidence," thereby confusing the standard for judicial review with the standard of proof governing the agency's determinations. Second, whether the degree of proof necessary at the agency level to make adverse findings in a license revocation case should be "clear and convincing" proof.[1]

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[1] The Commission's decision was adopted about one year before *Collins Securities Corp.* v. *Securities and Exchange Commission,* 183 U.S. App. D.C. 301, 562 F.2d 820 (1977), in which the court of appeals drew a distinction between "clear, unequivocal and convincing" and "clear and convincing" proof. As indicated to the court below, either standard is acceptable to Sea Island. Under the clear and convincing standard, the SEC was required "to reach a degree of persuasion much higher than 'mere preponderance of the evidence,' but still somewhat less than 'clear, unequivocal and convincing' or 'beyond a reasonable doubt.' " *Id.* at 305, 562 F.2d at 824.

Following oral argument, on its own motion, the court remanded the case to the Commission in order that two questions might be answered: "(1) What standard of proof was applied in the disposition of this matter by the Commission? (2) What would be the effect on the public interest if the Commission were to apply a 'clear and convincing' standard of proof to issues of fact in license revocation proceedings?" (App. 50a). The court did not ask the Commission what would have been the effect on the Commission's disposition of this case if the "clear and convincing" standard of proof had been applied.

The Commission replied to the court in a Report released December 11, 1978. Therein the Commission stated (a) it had used the preponderence of the evidence test in its review of the Initial Decision and (b) it opposed imposition of the higher standard urged by Sea Island. (App. 14a-18a). In addition the Commission alleged in a footnote:

> Thus, although the evidence supporting the conclusions in our Decision, *supra*, which were adverse to Sea Island was sufficient to satisfy the "clear and convincing["] test referred to by the Court of Appeals in *Collins Security [sic] Corp.* v. *SEC, supra,* we did not believe it necessary to state that the evidence was of the kind that could meet a higher standard than the customary preponderance of the evidence test. (App. 14a n.3).

There is no indication, however, that this statement was anything more than bootstrapping. The Commission did not recanvass the record in light of the higher standard of proof being urged upon the court by Sea Island. The issue with respect to which Sea Island seeks Supreme Court review was created when the court of appeals rejected the Commission's use of the preponderance of the

evidence test in favor of the clear and convincing standard, but failed to require the Commission to reconsider the case in light of the higher standard.

The Commission's reconsideration of the administrative record in this case would not be a meaningless exercise, particularly in light of the nature of the charges involved. The Commission's revocation decision relied heavily on the administrative law judge's conclusion that Sea Island's president and sole stockholder, Charles E. Bell, made deliberate misrepresentations to the Commission regarding improper billing practices at station WSIB. The record shows Bell admitted that, without his knowledge or consent, illegal rebates had been given to two advertisers between June and December, 1972.[2] He testified that he did not learn what had occured until after October 3, 1973, about five months after the Commission investigation of these matters began, and that a short time later he informed the Commission via letter of what he had learned. He consistently has denied ever lying to the Commission. The administrative law judge simply disbelieved Bell and Sea Island's other witnesses. (App. 45a). With minor modifications, the Commission adopted the judge's findings, which were based on a preponderance of the evidence. In essence, the Commission rested its revocation order on findings—including those on the essential question of truthfulness—reached under a lower standard of proof than subsequently required by the court of appeals. Yet, despite the fact the findings were based

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[2] Bell's son, Charles E. Bell Jr., as sales and station manager, had participated in the rebate arrangement. During the period when the rebates were made, Bell Sr. was absent from Beaufort for substantial periods of time. Rebate checks were issued by Bell Sr.'s wife on the instruction of Bell Jr. At the time, Mrs. Bell and Bell Jr. were officers and directors of Sea Island, but owned no stock.

on the wrong evidentiary standard, the court below affirmed the Commission's order.

REASONS FOR GRANTING THE WRIT

I. The Court Below Decided an Important Federal Question, Regarding the Scope of Review of Administrative Adjudications, in a Manner Contrary to the Administrative Procedure Act and Established Principles of Administrative Law.

The court of appeals decision below marks the first time the obligation of using a clear and convincing standard of proof in weighing the evidence in a broadcast license revocation proceeding has been imposed on the FCC. The court, in so doing, relied heavily on its earlier decision in *Collins Securities Corp.* v. *Securities and Exchange Commission*,[3] the reasoning of which was rejected by the Fifth Circuit in *Steadman* v. *Securities and Exchange Commission*.[4] This Court recently granted a petition for certiorari in *Steadman*.[5]

Having reached its holding regarding the standard of proof—a holding strongly urged by Petitioner—the court below nonetheless did not remand the case for Commission reconsideration under the more stringent standard. Instead, relying on a *post hoc* representation

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[3] 183 U.S. App. D.C. 301, 562 F.2d. 820 (1977). In *Collins*, the court held that the clear and convincing standard of proof must be used in SEC proceedings looking toward possible revocation of a broker's license. *Accord, Whitney* v. *Securities and Exchange Commission*, 196 U.S. App. D.C. 12, 604 F.2d 676 (1979).

[4] 603 F.2d 1126 (1979).

[5] Certiorari was granted on April 28, 1980. 48 U.S.L.W. 3698 (1980)(No. 79-1266).

by the FCC as to what would have happened had the higher standard of proof been applied, the court affirmed the agency's order revoking Sea Island's license. In an attempt to bolster its misplaced reliance on the Commission's representation, the court below stated, "Because the Commission did not expressly set forth [the clear and convincing] standard in the first instance, and indeed resisted it on remand, we have been particularly careful." (App. 11a-12a.) But it is unclear, at best, what the court was "particuarly careful" in doing. Had the proper standard of proof been applied at the agency level, the judicial function would have been limited to determination of whether substantial evidence supported the Commission's order. But here the Commission never adjudicated the case under the proper evidentiary standard; that failure completely undermines the Commission's factual determination, leaving no lawful basis for the revocation order. A gratuitous representation during the process of judicial review is not a substitute for an agency adjudication. By being "particularly careful" in its review, the court of appeals cannot *create* a lawful Commission determination. In fact, what the court did was to take upon itself the task of measuring the evidence in the administrative record—or rather a part of the record—against the newly-imposed standard of proof.

The court's action is contrary to the Administrative Procedure Act and a significant deviation from established principles of administrative law. Having laid bare the Commission's error of law, the court below exhausted its judicial power.[6] All that remained for the

[6] *E.g., Sunray Mid-Continent Oil Co.* v. *FPC*, 353 U.S. 944 (1957) (per curiam); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952); *Scripts-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 10 (1942); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

court to do was to remand the matter to the Commission for further proceedings in conformity with the applicable law. The Administrative Procedure Act specifically directs the reviewing court to "hold unlawful and *set aside* agency action, findings and conclusions found to be . . . not in accordance with law." 5 U.S.C. § 706(2)(A)(1976)(emphasis added). The proper path for the Court—remand to the Commission—was clearly lit by the precedents of this Court,[7] and the Court of Appeals for the District of Columbia Circuit itself.[8]

In affirming the Commission's order, the court below stated:

> In this case, the Commission has reported to the court that it would have made the same finding in using the "clear and convincing" standard. We have confidence in the accuracy of this representation. (App. 11a).

But that Commission representation was not the product of *de novo* review of the evidence in the administrative record. It is nothing more than speculation on the part

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[7] *E.g., NLRB* v. *Enterprise Assoc.*, 429 U.S. 507, 522 n.9 (1977); *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) *(Chenery II); SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) *(Chenery I); accord, Consolo* v. *Federal Maritime Commission, 383 U.S. 607, 620-21 (1966); see Ralston Purina Co.* v. *Louisville & Nashville R. Co.*, 426 U.S. 476, 477-78 (1976) (per curiam).

[8] *E.g., Central Florida Enterprises, Inc.* v. *FCC*, 194 U.S. App. D.C. 118, 141, 598 F.2d 37, 60 (1978); *United States Lines, Inc.* v. *Federal Maritime Commission*, 189 U.S. App. D.C. 361, 374, 584 F.2d 519, 532 (1978); *Collins Securities Corp.* v. *SEC*, 183 U.S. App. D.C. 301, 307, 562 F.2d 820, 826 (1977); *Charlton* v. *FTC*, 177 U.S. App. D.C. 418, 423, 543 F.2d 903, 908 (1976); *see KIRO, Inc.* v. *FCC*, 178 U.S. App. D.C. 126, 130, 545 F.2d 204, 208 (1976).

of the Commission as to what might have been decided.[9] An administrative order must stand or fall on the grounds invoked by the agency itself at the time of its Decision. "If that finding is not sustainable on the administrative record made, then the [agency's] decision must be vacated and the matter remanded . . . for further consideration." *Camp* v. *Pitts,* 411 U.S. 138, 143 (1973). At the time of its Decision, the Commission did not apply the clear and convincing standard. The court of appeals should not have pretended that the Commission did.

The *post hoc* nature of the statement in the Report characterizing the evidence is illuminated further by the fact that only one of the Commissioners who issued the Report also participated in the Commission's 1976 Decision.[10] Thus, in effect, one panel of officials was trying

[9] Had the Commission recanvassed the record, it clearly could have said so. Compare the Commission's Order in *Pass Word, Inc.* _____ F.C.C. 2d _____, 47 R.R. 2d 67 (1980):

> STANDARD OF PROOF
>
> . . . This matter first came before the Commission on December 19, 1979. On that date, we voted to revoke all licenses and deny all applications of Pass Word and Rodney Bacon d/b/aCoeur d'Alene Answering Service . . . . At that time, the standard of proof used by the Commision in a revocation proceeding was the "preponderance of the evidence" test. *Sea Island Broadcasting Corp.*, 69 F.C.C. 2d 1796 (1978). On January 14, 1980, before this decision was released, the U.S. Court of Appeals for the District of Columbia Circuit held, on appeal of *Sea Island,* that "revocation of an FCC license is governed, at the agency level, by the 'clear and convincing' standard of proof set forth in the *Collins* decision for an SEC revocation of a broker's license." *Sea Island Broadcasting Corp.* v. *FCC,* _____ F.2d _____, No. 76-1735 (D.C. Cir., Jan. 14, 1980). *Accordingly, we have recanvassed the record to determine whether the evidence satisfies the standard announced by the Court of Appeals.* 47 Rad. Reg. 2d at 103. (footnotes omitted) (emphasis added).

[10] Only Commissioners Lee, Quello, and Washburn were serving on the Commission at both times. But Commissioner Quello did not participate and Commissioner L[illegible]as absent when the 1976 Decision was adopted.

to convince the court below what an almost completely different panel of officials would have done if it had used the proper legal standard. The courts may review only what the agency did, not what it might have done.

It is well established that courts may not accept "appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962); *accord, Federal Power Commission* v. *Texaco, Inc.,* 417 U.S. 380, 397 (1974). Similarly the courts should not accept *post hoc* rationalizations by the agency itself. The Third Circuit has recognized this principle on at least two occasions where agencies sought, on appeal, to buttress an inadequate administrative record with further reasoning. *American Iron and Steel Institute* v. *Environmental Protection Agency,* 568 F.2d 284, 296-97 (3d Cir. 1977); *Dry Color Manufacturers' Association, Inc.* v. *Department of Labor,* 486 F.2d 98, 104 n.8 (3d Cir. 1973). In addition, both the Fourth and Fifth Circuits have enunciated the principle and followed the practice of disregarding after-the-fact rationalizations by the agency. *E.I. DuPont de Nemours & Co.* v. *Train,* 541 F.2d 1018, 1026 (4th Cir. 1976), *modified on other grounds,* 430 U.S. 112 (1977); *American Petroleum Institute* v. *Occupational Safety and Health Administration,* 581 F.2d 493, 506 (5th Cir. 1978), *cert. granted,* 440 U.S. 906 (1979).

The Commission's Report is analogous to the litigation affidavits that this Court has held to be an inadequate basis for judicial review of administrative action. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419 (1977). In *Citizens,* the decision of the Secretary of Transportation approving the construction of a highway through a park was challenged in federal district court as contrary to Section 4(f) of the Depart-

ment of Transportation Act of 1966 and Section 138 of the Federal-Aid Highway Act of 1968. In district court, the defendants introduced affidavits, prepared specifically for the litigation, which indicated that the Secretary's decision was supportable. This Court, characterizing the affidavits as *post hoc* rationalizations, held that judicial review based solely on the affidavits was inadequate. 401 U.S. at 419.

Similarly here, the Commission relies upon its Report, prepared specifically for appellate review, to sustain its Decision. The Report is not the product of detached adjudicatory decision-making, but is rather the product of a litigant seeking to justify its previous actio[illegible] In this context, it was error for the court below to accept the Commission's representation contained in footnote 3 of the Report. In applying the standard for judicial review enunciated in 5 U.S.C. § 706(2)(A), the focal point "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts,* 411 U.S. at 142.

On remand, the question of the disposition of the case under the higher standard was not even before the Commission. The Commission itself recognized the limited scope of the remand when it dismissed Sea Island's request for treatment under the newly-adopted "distress sale" policy. Grant of that request would have allowed the sale of WSIB to a Black-controlled partnership at a price below market value. In a Memorandum Opinion and Order, adopted the same day as its Report, the Commission stated:

> Although the Court of Appeals has remanded this case proceeding to us, it is clear that it has done so only for the purpose of obtaining answers to specific questions posed by the Court . . . . Under these circumstances, the remand order of the Court

> must be construed as a very narrow and limited one, which does not relinquish the Court's statutory jurisdiction over this case . . . . (App. 52a n. 1).

Stripping away the facade of the Commission's *post hoc* representation, it becomes obvious that the court below usurped the Commission's task of weighing evidence of wrongdoing against the clear and convincing standard. Clearly it should not have done so. One of the most deeply rooted tenets of administrative law is that the reviewing court's power is limited to correcting the agency's errors of law.

> When an administrative agency has made an error of law, the duty of the Court is to "correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law." *National Labor Relations Board* v. *Enterprise Association,* 429 U.S. 507, 522 n.9 (1977) (quoting *Interstate Commerce Commission* v. *Clyde Steamship Co.,* 181 U.S. 29, 32-33 (1901)).

Here, the court of appeals properly held that the Commission committed an error of law by not applying a clear and convincing standard of proof to this license revocation proceeding. The Commission must now examine the evidence and find the facts under the proper standard of proof. The court of appeals may not assume the task Congress has assigned to the Commission.

The seminal case of *Securities and Exchange Commision* v. *Chenery Corp.,* 318 U.S. 80 (1943) (*Chenery I),* further supports Petitioner's contention that the court of appeals has exceeded its proper role as a reviewing court.

> If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make *and which it has not made,* a

> judicial judgment cannot be made to do service for an administrative judgment. *For purposes of affirming no less than reversing its orders,* an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency. *Id.* at 88 (emphasis added).

The court of appeals lacks the authority to declare the evidence in the administrative record to be clear and convincing. It can only affirm or vacate a Commission determination in that regard. Since the Commission has not reached such a determination in a proper adjudicatory setting, the court of appeals is powerless to affirm the Commission's order in this case. As this Court held in *Chenery II:*

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action *solely* by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

Furthermore, the disposition of this case by the court below is in direct conflict with two decisions in the same circuit which clearly indicate that remand is required when an agency has used an incorrect standard of proof in reaching an adjudicatory decision. *Collins Securities Corp.* v. *Securities and Exchange Commission,* 183 U.S. App. D.C. 301, 302-03, 562 F.2d 820, 821-22 (1977); *Charlton* v. *Federal Trade Commission,* 177 U.S. App. D.C. 418, 423, 543 F.2d 903, 908 (1976). In *Charlton,* the court of appeals held that the agency had applied the wrong standard of proof; there,

however, the court of appeals correctly remanded the case.

> We perceive one error which, all else aside, necessitates administrative reconsideration of the evidence. The crux of the difficulty is the Commission's use of a totally incorrect standard of proof in passing on Charlton's blameworthiness. It follows that, however Charlton might fare on his other contentions, the Commission's present disciplinary order could not be left standing. 177 U.S. App. D.C. at 421, 543 F.2d at 906.

Similarly in *Collins*, after holding that a clear and convincing standard of proof rather than a mere preponderance of the evidence was to be used by the agency, the court of appeals stated:

> Any review of the evidence in this opinion would necessarily be selective in some degree, and we do not wish to convey the impression that the Commission may likewise be selective in its reconsideration. On remand, the *entire* evidentiary record must be reconsidered by the Commission. 183 U.S. App. D.C. at 307, 562 F.2d at 826.

The circuit previously has followed consistently the established principle that the reviewing court's function is limited to correcting the agency's error of law; it may not uphold an agency order on grounds other than those enunciated by the agency at the time of its decision.[11]

The Administrative Procedure Act provides "[a] sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts

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[11] *E.g., Central Florida Enterprises, Inc.* v. *FCC*, 194 U.S. App. D.C. 118, 141, 598 F.2d 37, 60 (1978); *United States Lines, Inc.* v. *Federal Maritime Commission*, 189 U.S. App. D.C. 361, 374, 584 F.2d 519, 532 (1978); *KIRO, Inc.* v. *FCC*, 178 U.S. App. D.C. 126, 130, 545 F.2d 204, 208 (1976).

cited by a party . . . ." 5 U.S.C. § 556(d)(1976). When an agency is "consider[ing]" the record it is axiomatic that at the time it does so it must concurrently be using the proper standard. The standards of clear and convincing proof and preponderance of the evidence are so different that the court and the Commission must not be allowed merely to pay lip service to the higher standard.[12]

The necessity that the administrative agency itself weigh the evidence is emphasized by the situation presented to this Court in *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276 (1966).[13] There the Court held that in the absence of an expression of Congressional intent to the contrary,[14] the judiciary may determine the degree of proof required in deportation proceedings. The Court further held that in such proceedings, the Government must establish its allegations by clear, unequivocal and convincing evidence. *Id.* at

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[12] The importance of the Commission's obligation as trier of fact is emphasized by the formulations that have been given to the clear and convincing standard of proof. For instance:

> "[T]he witnesses to a fact must be found to be credible and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order and that the testimony be clear, direct and weighty and convincing so as to enable [the trier of fact] to come to a clear conviction without hesitancy of the truth of the precise facts in issue." *Aetna Insurance Co.* v. *Paddock,* 301 F.2d 807, 811 (5th Cir. 1962) (quoting the trial court with approval). *See generally* VIII A. WIGMORE, EVIDENCE § 2398 (1940).

[13] In *Woodby,* this Court construed Sections 106(a)(4), and 242(b)(4) of the Immigration and Naturalization Act, 8 U.S.C. §§ 1105a(a)(4), 1252(b)(4). The pertinent provisions of those sections are substantially similar to Sections 7 and 10(e) of the Administrative Procedure Act at issue here, 5 U.S.C. §§ 556, 706.

[14] *See Vance* v. *Terrazas,* 62 L.Ed. 2d 461, 473-74 (1980).

286. In one of the two cases before the Court in *Woodby*,[15] the agency's special inquiry officer concluded that the Government had established its contentions to support a deportation order " 'with a solidarity far greater than required,' but did not further elucidate what was 'required.' "[16] The Board of Immigration Appeals stated that it was " 'established beyond any reasonable doubt' " that the petitioner had obtained a passport under a false name and that it was a " 'most unlikely hypothesis' " that someone other than the petitioner had obtained and used the passport.[17] Despite these findings at the agency level, this Court, upon holding that a clear, unequivocal and convincing standard of proof must be applied, set aside the judgment of the court of appeals, and remanded the case with directions to remand to the agency for further proceedings.

Similarly here upon holding that a higher standard of proof than previously used is required in FCC license revocation proceedings, the court of appeals should have remanded the case to the Commission. In failing to do so, the court exceeded the scope of review established in the Administrative Procedure Act. If allowed to stand, the decision below will mark a significant expansion of the role of reviewing courts in weighing the evidence in administrative actions.[18]

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[15] *Sherman* v. *Immigration and Naturalization Service*, 350 F.2d 894 (2d Cir. 1965), *remanded*, 385 U.S. 276 (1966).

[16] 385 U.S. at 279.

[17] *Id.*

[18] The Court, in its discretion, may deem this matter suitable for summary disposition, such as was employed in a similar case, *Sunray Mid-Continent Oil Co.* v. *FPC*, *353 U.S. 944 (1957)* (per curiam). In *Sunray*, the Federal Power Commission had determined that it lacked the power under § 7(c) and (e) of the Natural Gas Act, 15 U.S.C. § 717f(c)(e) to issue certificates of public convenience and necessity of limited duration. The Court of Appeals for the Tenth Circuit held that the Commission did have authority to issue such certificates, but went

II. This Case and *Steadman*, for which Certiorari Has Been Granted, Involve Two Aspects of a Larger Administrative Law Issue: Tandem Review Would Be Appropriate

This Court recently granted a petition for a writ of certiorari to review *Steadman* v. *Securities and Exchange Commission, 603 F.2d 1126 (5th Cir. 1979), cert. granted,* 48 U.S.L.W. 3698 (1980)(No. 79-1266). The issue presented in that case is whether, in SEC disciplinary proceedings, violations of the anti-fraud provisions of federal securities laws must be proved by clear and convincing evidence. The Fifth Circuit affirmed the SEC as to the standard of proof, holding that only a preponderance of the evidence is required. Petitioner Steadman asserts that the Fifth Circuit's opinion is irreconcilably in conflict with *Collins Securities Corp.* v. *Securities and Exchange Commission, supra.* In *Sea Island,* as noted previously, the court below heavily relied upon *Collins* in imposing the clear and convincing standard of proof in FCC license revocation proceedings. *See* note 3 *supra.*

By considering this case and *Steadman* in tandem, the Court will have the opportunity to give clear guidance to the courts below regarding (1) the standard of proof to be applied in agency proceedings looking toward the imposition of serious sanctions, and (b) the proper disposition by the reviewing courts of cases in which the agency used a lower standard than required.

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on to affirm the order on the ground that it would have been appropriate for the Commission to deny issuance of the certificate. This Court granted certioriari, and summarily reversed and remanded the case to the court of appeals for remand to the Commission. The Court held that the reviewing court's power was exhausted when it held that the Commission had the authority to issue the certificate. *Id.* at 945.

While the two cases obviously do not present the same question, they do present two aspects of a larger administrative law issue regarding the importance of the standard of proof used in agency adjudications. Both aspects of the issue should be addressed by the court.

CONCLUSION

For these reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 3, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 76-1735

SEA ISLAND BROADCASTING CORPORATION OF S.C.,
Appellant

v.

FEDERAL COMMUNICATION COMMISSION, *Appellee*

APPEAL FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: LEVENTHAL* and ROBINSON, *Circuit Judges,* and RICHEY**, *United States District Judge for the District of Columbia*

Judgment

Filed Jan 23, 1980

This cause came on to be heard on the record on appeal from the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is ORDERED AND ADJUDGED, by this Court, that the order of the Federal Communications Commission under review herein is hereby affirmed, in accordance with the Opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/GEORGE A. FISHER
GEORGE A. FISHER
Clerk

Dated: January 14, 1980
Opinion for the Court filed by Circuit Judge Leventhal.

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* This opinion was written by Circuit Judge Leventhal and concurrences were received from the other Judges prior to his death.

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1735

SEA ISLAND BROADCASTING CORPORATION OF S.C., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal From An Order Of The
Federal Communications Commission

Argued June 2, 1978

Decided January 14, 1980

John H. Midlen, Jr. with whom *John H. Midlen* was on the brief, for appellant.

Thomas R. King, Jr., counsel, Federal Communications Commission, with whom *Robert R. Bruce*, General Counsel and *Daniel M. Armstrong*, Associate General Counsel were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: LEVENTHAL * and ROBINSON, *Circuit Judges*, and RICHEY **, *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Circuit Judge* LEVENTHAL.

LEVENTHAL, *Circuit Judge*: This case is before the court on appeal by Sea Island Broadcasting Corporation (Sea Island) from a decision of the Federal Communications Commission which revoked its license to operate WSIB, an AM radio station in Beaufort, South Carolina.[1] The Commission's revocation was based primarily on grounds that the owner and officers of Sea Island made deliberate misrepresentations and other misleading and deceptive statements to the Commission in order to conceal improper billing practices. The Commission concluded that Sea Island has shown "a classic pattern" of such misrepresentations and misleading statements "when it believed it could effectively conceal suspected wrongdoing."[2] It further ruled that the kinds of fraudulent billing used by Sea Island "were serious and reinforced our conclusion to revoke Sea Island's license." The Commission concluded:

> In short, the effective regulation of the communications industries under our jurisdiction is premised on our ability to depend on the accuracy and truthfulness of our licensee's representation to us. Once we find that we cannot rely on a licensee's represen-

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* This opinion was written by *Circuit Judge* Leventhal and concurrences were received from the other Judges prior to his death.

** Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] The Commission's Decision is reported at 60 FCC 2d 146 (1976) (J.A. 19). The Memorandum Opinion and Order denying reconsideration is reported at 64 FCC 2d 721 (1977) (J.A. 36).

[2] 60 FCC 2d at 30.

> tations to us, the only suitable penalty is revocation of the license.

In denying reconsideration, the Commission pointed out that it had given Sea Island a fair opportunity to present its arguments and that it had had oral argument before the Commission upon the exceptions to the initial decision of the presiding administrative law judge. The Commission stated:

> Hearing oral argument in a proceeding such as this provides the Commissioners with the opportunity to ask the parties probing questions on any matters of record, including the evidence and the findings and conclusions of the presiding judge as well as the significant arguments raised in the written pleadings of the various parties.

The case arises out of an investigation by the FCC's Broadcasting Bureau in 1973 into the station's advertising sales and billing practices. The Commission's rules provide that no licensee shall knowingly issue any documents which misrepresent the amounts charged for advertising, the nature, content or quality of the advertising, or the date or time of broadcast.[3]

The record discloses that Sea Island admitted the facts forming the basis for the Commission's finding that it violated the rule. It suffices here to mention the violation that occurred when Charles Bell, Jr., sales and station manager, and a vice president, treasurer and director, entered into an agreement with one Smith, manager of a TV store (Palmetto). Smith agreed to

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[3] 47 C.F.R. § 73.1205 (1976) (Addendum) is known as the "fraudulent billing rule." This rule was amended in 1976, but the amendment was minor and not pertinent to this case. 41 Fed. Reg. 23675-78 (1976). The term "fraudulent billing" has become an abbreviated manner of referring to various billing practices prohibited by Section 73.1205. Decision, 60 FCC 2d at 147 n.2 (J.A. 20 n.2).

purchase cooperative advertising on WSIB, and in return Bell agreed to rebate to Palmetto its share of the cost of the cooperative advertising. The mother of Charles Bell, who was secretary of the corporation, and business manager, issued rebate checks of approximately $2500, which caused a national cooperative advertiser, Philco-Ford, to pay twice what it should have paid for the advertising run on WSIB. Eventually Charles Bell, Sr. wrote to the Bureau on November 16, 1973 admitting to the rebates by WSIB of one-half of the amount of monthly billings to Palmetto. However, when the field investigators interviewed both Charles Bell, Sr. and Charles Bell, Jr. in April 1973, they denied knowledge of fraudulent billing. At the hearing Charles Bell, Jr. admitted that his statement was false. His position was that he did not believe the rebates violated the rule though he thought the arrangement was shady. As to Charles Bell, Sr. he had previously written a letter to the Commission on October 3, 1977, in response to letters from the Complaints Division of the Broadcast Bureau on August 29, requesting information, and on September 18, indicating that comparison of ledger sheets gave indication that WSIB may have been involved in fraudulent billing.

In the October 3 letter Charles Bell, Sr. stated that the billing procedures had been "carefully reviewed," stated that he had been unable to find an explanation from the employee who made the bookkeeping entries ("not a trained bookkeeper") of the matter and advised that it was not the handwritten ledger sheets but the typewritten ledger sheets that were used for billing. Bell's subsequent testimony revealed that before sending the October 3 letter he had not questioned his wife (the bookkeeper), his son, or Palmetto's proprietor about the matter and had not inspected the typewritten ledger sheets which had been used. He later wrote the Bureau

that it was not until after his October 3 letter and his examining the typewritten ledger sheets as instructed, that he discussed the matter with his wife and son and learned that his son had agreed to the rebate.

The Administrative Law Judge reached the following conclusion as to the credibility of Bell, Sr.:

> It has been found that time after time Bell, Sr. denied knowledge of the fraudulent billing under circumstances which render those denials impossible of belief. He apparently believed that if he could paint himself as the credulous victim of a wife and son who permitted him to destroy himself through their silence he could escape accountability. The record warrants no such conclusion.

The Commission agreed with the ALJ's findings and conclusions:

> We cannot believe that Bell, Sr. did not question his wife or son about possible fraudulent billing for over five months following the April 1973 visit to WSIB by Commission investigators.
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> * * * *
>
> Upon receipt of the Commission's September 18, 1973 letter he must have known that WSIB billing practices concerning the Palmetto account, were being questioned by the Commission. Further, Bell knew that his wife kept the station's records and thus would have to know about any fraudulent billing practices and that his son was the salesman for the Palmetto account. Bell's explanation that he did not question his wife and son because he trusted them does not make sense. If he trusted them he would have no natural reason for not questioning them.

The Commission stated: "The crux of our decision to revoke Sea Island's license is our conclusion that the owner and officers of Sea Island made deliberate misrepresentations to the Commission. . . ." It is abundantly

clear from the foregoing that there was substantial evidence to support the Commission's order of revocation.

Appellant further argued that the Commission assumed that its only task was to determine whether there was "substantial evidence" to support a finding of misrepresentation and fraudulent billing. Had it governed itself by such a standard, it would clearly have been in error,[4] would have confused the standard for judicial review ("substantial evidence") with the standard of proof governing the agency. While the Commission report does use the term "substantial" it is in a context which showed that it was requiring that the evidence be "reliable, probative and substantial." We reject appellant's contention.

Appellant separately argued that the standard of proof necessary to the Commission in order to justify such an order must be "clear and convincing." The appellant considered the case governed by *Collins Security Corp. v. SEC*, 183 U.S.App.D.C. 301, 562 F.2d 823 (1977). And it argued that the Commission had applied a "preponderance of evidence" standard, and did not require "clear and convincing evidence."

After oral argument, the court remanded the record to the Commission in order that it might have the views of the Commission concerning the following matters:

(1) What standard of proof was applied in the disposition of this matter by the Commission?

(2) What would be the effect on the public interest if the Commission were to apply a "clear and convincing" standard of proof to issues of fact in license revocation proceedings?

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[4] Charlton v. FTC, 177 U.S.App.D.C. 418, 543 F.2d 903 (1976).

In its report to the court, adopted November 30, 1978 [5] the Commission stated:

> that when it reviewed the Initial Decision and the record in this proceeding, *de novo*, it applied the customary standard of proof in an administrative proceeding, *i.e.*, the preponderance of the evidence test. 69 FCC 2d at 1797.

The use of the "preponderance of evidence" standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d).[6]

In its report the Commission stated that the evidence supporting its action of revocation "was sufficient to meet the "clear and convincing test," but further submitted that the *Collins* test is not applicable to this case and actions by the FCC.

In support of its view that *Collins* is not applicable, the Commission submitted: Broadcasters have a special "public trust" status, as public trustees of a scarce resource. In view of the scarcity of broadcast frequencies "the grant of a license to one person precludes another from obtaining such a privilege." Since the licensees "receive very significant benefits by virtue of their status as Commission licensees, they owe the public a very high standard of stewardship in return for their privileged positions." It is not appropriate to require a higher standard of proof than traditional preponderance, where the licensee has abused its "special fiduciary duty to the public." The loss of a broadcast license does not amount

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[5] In re Sea Island Broadcasting Corp. of S.C. (WSIB), 69 FCC 2d 1796 (1978).

[6] H.R. Rep. No. 1980, 79th Cong., 2d Sess. 37 (1946) reprinted in S. Doc. No. 248, 79th Cong., 2d Sess., Administrative Procedure Act—Legislative History 271 (1946).

to potential deprivation of a livelihood as in *Collins* since the former licensee may still obtain a job in the broadcasting industry and the revocation of one license "would not necessarily result in the loss of any other broadcasting station's license held by such a licensee." The analysis in FCC revocation proceedings does not usually rely on the sophisticated type of inferential proof that is involved in SEC proceedings. "Our revocation proceedings usually involve relatively simple factual questions such as whether a particular licensee violated our rules by performing or failing to perform certain acts."

While the Commission has some persuasive points, it has not satisfied us that the difference in consequence is notable in terms of distinguishing an SEC revocation from an FCC revocation. The broadcaster who loses his license may get other jobs in the industry, but he certainly has lost a business. The holder of multiple licensees may continue to hold one although another is revoked, but the fact of revocation of one license would not be ignored in case of a challenge to other licenses.

That the revocation grounds may be simply proved is no reason for requiring less evidence of the violation. True, there is less danger of misapprehension of issues, but correspondingly there should be little burden involved in making clear proof of the fraud.

The Commission is concerned lest a higher standard of proof either weaken its regulation authority or encourage or sanction shady tactics by licensees. There is a difference between the duty imposed on a licensee (the higher standard pertinent to a trustee) and the degree of proof required to convince the decision maker that there has been a violation of that duty. The fiduciary duty is good reason for holding that when there has been a misrepresentation even on a relatively minor matter, the very fact of misrepresentation is more important than the item involved, since the Commission must proceed on

the basis of absolute trust and confidence in the representations made to it by its licensees. *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946); *Lorain Journal Co. v. FCC*, 122 U.S.App.D.C. 127, 351 F.2d 824.

What is perhaps a more important distinction between FCC and other licenses is this: A broker has expectation of business for a lifetime. An FCC broadcast license is for a three-year period. It may even be removed from a person who is law-abiding if another is distinctly superior, as shown in a subsequent comparative proceeding. In such a proceeding it would suffice that distinctly superior capability, under the various criteria used by the FCC in comparative proceedings, be shown by a preponderance of evidence.

However, there is a "security" of interest during a license term even assuming there is none at the end of a term. *CAB v. Delta Air Lines*, 367 U.S. 316 (1961). And in the case of FCC licenses there is some expectancy of renewal, for a wide range of situations, at least in terms of a preference over others who are only equally qualified. *Fidelity Television v. FCC*, 169 U.S.App.D.C. 225, 243, 515 F.2d 684, 702 (1975).

There is also the consideration that when the FCC proceeds against a licensee for civil liability, because of violation of FCC rules, the appropriate standard would be preponderance of the evidence. True that would be the standard applied by the court in a *de novo* proceeding, but the liability would be assessed initially by FCC under a preponderance standard; see 5 U.S.C. § 554, as governing agency forfeiture proceedings.

After all the analysis, we stand with the view that revocation of an FCC license is governed, at the agency level, by the "clear and convincing" standard of proof set forth in the *Collins* decision for an SEC revocation of a broker's license. We do not believe that this stand-

ard will, as the Commission fears, "significantly burden" its efforts to regulate licensees in furtherance of the public interest.

We do not suggest that the FCC should be required to apply a "clear and convincing" standard as to all matters which come before it. We certainly agree that there are many license revocation proceedings where nothing resembling a loss of livelihood is involved, as in the case of Amateur Band ("HAM") and Citizen Band ("CB") licensees. The same consideration would likely apply to licenses in such services as the Industrial Radio Service (business, manufacturing, forest products, petroleum, power—see 47 C.F.R. Part 91) and Land Transportation Radio Service (railroads, buses, trucks, taxicabs, automobile emergency—see 47 C.F.R. Part 93), where radio frequencies are used merely as a means of increasing the efficiency of certain occupations or activities.

In this case the Commission has reported to the court that it would have made the same finding in using the "clear and convincing" standard. We have confidence in the accuracy of this representation. We set forth some pertinent facts in the preceding portion of this opinion. There is much more to the same effect. The Commission heard oral argument, and gave appellant an effective opportunity to do what it could to undercut the case mounted against it. Where the Commission expressly applies the "clear and convincing" standard, the judicial function is only to see whether there is "substantial evidence" to support the Commission's determination.[7] Because the Commission did not expressly

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[7] In an even more extreme case, where the jury is instructed to find a person guilty of a crime only if satisfied of guilt "beyond a reasonable doubt," its verdict is supported by the court so long as it is supported by substantial evidence.

set forth that standard in the first instance, and indeed resisted it on remand, we have been particularly careful. We are ourselves convinced that the Commission at all times considered the proof of appellant's derelictions to be clear and convincing.

Affirmed.

APPENDIX B

FCC 78-840

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of the License of SEA ISLAND BROADCASTING CORPORATION OF S.C. (WSIB) Beaufort, South Carolina	Docket No. 19886

REPORT

(Adopted: November 30, 1978; Released: December 11, 1978)

BY THE COMMISSION:

1. In a Decision, 60 FCC 2d 146 (1976), reconsideration denied, 64 FCC 2d 721 (1977), the Commission revoked the license of Sea Island Broadcasting Corporation of S.C. (Sea Island) for Station WSIB, Beaufort, South Carolina. Our decision was based primarily on the fact that Sea Island had shown a classic pattern of making deliberate misrepresentations and other misleading and deceptive statements to us in order to conceal billing practices which violated Section 73.1205 of our Rules. We also determined that the kinds of improper billing practices engaged in by Sea Island were serious and reinforced our conclusion to revoke Sea Island's license. Sea Island appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit, which has remanded the case to us in order to ascertain what standard of proof was applied in this proceeding and to obtain our views concerning the relevant public interest considerations inherent in applying a "clear and convincing"

standard of proof to license revocation proceedings held before this agency.

2. The Commission reviewed the Initial Decision and the record in this processing, *de novo*, pursuant to authority granted by 5 U.S.C. §557(b).[1] In conducting our review, we assumed that the customary standard of proof in an administrative proceeding, namely the preponderance of the evidence test,[2] applied in this case. Since, after completing our analysis, we concluded that the evidence against Sea Island was overwhelming and clearly met this normal administrative standard, we did not feel it necessary to discuss the matter in our opinion.[3] In answering the argument made by Sea Island that the "clear, unequivocal and convincing" standard articulated in *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966), should apply in this proceeding, we did indicate that "the pertinent provisions of Section 556(d) of the APA clearly require only that a Commission decision be 'supported by and in accordance with the reliable, probative, and substantial evidence' of record," since we believed that Congress's use of the term "substantial" in 5 U.S.C. 556(d) necessarily assumed a finding that the evidence met the normal preponderance of the evidence test, but did not impose a higher standard.[4] Similarly, by use of the term "substantial" in footnote 8 of our Decision, 60 FCC 2d at 150, we meant that the Broadcast Bureau had not presented a sufficient amount of evidence to satisfy the customary preponderance of the evidence standard.

3. We do not believe that the rationale of the Court of Appeals' decision in *Collins Securities Corporation* v. *SEC (Collins)*, 562 F.2d 820 (1977), is applicable to this case or to revocation proceedings at this agency in general. In *Collins*, the Court stated that, because of the

[1] The third sentence of 5 U.S.C. §557(b) states: "On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."

[2] 9 Wigmore, Evidence §2498 (3d ed., 1940); McCormick *Handbook of the Law of Evidence*, §'s 339 and 355 (2d ed. Cleary, 1972); and *Collins Security Corp.* v. *SEC*, 562 F.2d 820, 823 (1977).

[3] Thus, although the evidence supporting the conclusions in our Decision, *supra*, which were adverse to Sea Island was sufficient to satisfy the "clear and convincing test referred to by the Court of Appeals in *Collins Security Corp.* v. *SEC*, *supra*, we did not believe it necessary to state that the evidence was of the kind that could meet a higher standard than the customary preponderance of the evidence test.

[4] In this regard, the legislative history of 5 U.S.C. §556(d) indicates that Congress assumed the standard of proof in administrative proceedings was the preponderance of the evidence test. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 37 (1946), reprinted in S. Doc. No. 248, 79th Cong., 2d Sess. *Administrative Procedure Act—Legislative History* (1946) contains the following language at page 271:

> "[W] here a party having the burden of proceeding has come forward with a *prima facie* and substantial case, he will prevail unless his evidence is discredited or rebutted. In any case the agency must decide 'in accordance with the evidence.' Where there is evidence pro and con, the agency must weigh it and decide in accordance with the *preponderance*." (Emphasis added.)

type of case involved (fraud), and the heavy sanction imposed by the Securities and Exchange Commission (deprivation of livelihood), as well as the type of circumstantial proof on which the SEC must often rely, the proper standard of proof was "clear and convincing" evidence, as opposed to a preponderance of the evidence. 562 F.2d at 824. However, a comparison of the regulatory framework in *Collins, supra*,[5] with the regulation of broadcasters, like Sea Island in this proceeding, discloses significant differences which do not justify imposing a "clear and convincing" standard on this Commission in revocation proceedings.

4. Thus, it has long been recognized that broadcasters have a special status as public trustees of a scarce resource, namely, the broadcast frequencies. The Supreme Court has noted that, because broadcast frequencies are limited, "they have been necessarily considered a public trust," *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 383 (1969), and that broadcast licenses are a privilege, in these words:

> "Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. §301." *Red Lion, supra*, at 394.

If the Government had not decided to create a special regulatory system to insure that broadcasters would not receive interference in their licensed service areas, broadcasters would not have the special type of privileges they now enjoy. Thus, the scarcity of broadcast frequencies necessitated the creation of a regulated industry, by which the grant of a license to one person precludes another from obtaining such a privilege, and in which the licensed members were given a specially protected economic status not available in the market place in return for responsibility to perform as trustees of special public resources. Since broadcast and common carrier[6] licensees receive very significant benefits by virtue of their status as Commission licensees, they owe the public a very high standard of stewardship in return for their privileged positions. Given the special standing of licensees as recipients of valued privileges, it is not appropriate to require the Commission to meet a higher standard of proof in revocation proceedings than the traditional preponderance of the evidence test where the licensee has abused its special fiduciary duty to the public.[7]

5. In addition, although revocation of a broadcast license can result

[5] Securities dealers and brokers who register with the SEC, rather than receiving a numerically limited, special privilege from the government are merely allowed to participate in whichever facets of the securities industry they may choose.

[6] The Commission bestows similar advantages upon various radio common carrier licensees which receive authority to use certain radio frequencies to provide services for hire, such as licensees in the Domestic Public Land Mobile Radio Services (See 47 CFR Part 21).

[7] In this regard, Section 307(d) of the Communications Act provides that broadcast licensees shall be for no more than three years whereas other licenses can be granted for periods of up to five years. This shorter license period for broadcast stations is

in the loss of a business enterprise by a licensee, this Commission's station revocation proceedings do not usually involve the potential deprivation of a licensee's livelihood as was the case in *Collins, supra*. For example, a broadcaster who loses a license for a broadcast station is not barred by the Commission from the broadcast industry and is not in the same position as a doctor or lawyer who loses his life-long license to practice his profession. The loss of a broadcast license would not preclude the former licensee from obtaining a job in the broadcast industry, would not deprive him of any of the various operators' licenses described in Part 13 of our Rules (47 CFR Part 13) which are required to be held by those who operate stations licensed by the Commission, and would not necessarily result in the loss of any other broadcast station licenses held by such a licensee. Thus, even when license revocation proceedings result in the loss of a broadcast license, the sanction which the Commission imposes in such cases is limited to the specific license which is the subject matter of the proceeding.[8]

6. Moreover, although our revocation proceedings may rely, in part, on circumstantial evidence, and although circumstantial evidence can, in some instances, be very significant in the resolution of disputed issues of fact, we do not believe that the inferences we make in ordinary cases involve the same kind of reliance upon elaborate and indirect showings which the Court of Appeals in *Collins, supra*, attributes to the SEC.[9] In *Collins, supra*, 562 F.2d at 822–823, the Court of Appeals articulated its concern about the inferential mode of reasoning exercised by the SEC to support allegations of security law violations in market fraud cases, as follows:

> "The legitimate need to rely on inferential evidence does, however, illuminate the ambiguity and lack of precision in the definition of many security law violations."

In contrast, even when our revocation proceedings involve the analysis of facts and circumstances concerning possible misrepresentations to the Commission, which is always a painstaking task, such an analysis ordinarily involves traditional considerations of direct as well as circumstantial evidence and does not usually rely on the sophisticated type of inferential proof which the Court of Appeals noted in discussing SEC proceedings. Thus, as stated above, our revocation proceedings usually involve relatively simple factual questions, such as

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further evidence of the temporary quality of broadcast licenses as well as the legislative desire to have the licensee's public interest performance examined on a rather frequent basis.

[8] In *Donald W. Reynolds*, FCC 77–497, 41 R.R.2d 16 (1977), the Commission granted license renewal applications for several broadcast stations even though it had refused to renew the license of commonly owned station KORK-TV, Las Vegas, Nevada, due to serious misconduct at that station.

[9] As we explained in our Decision, the Broadcast Bureau did not have to prove common law fraud in order to prove that Sea Island violated Section 73.1205 of our Rules. 60 FCC 2d 146, 149.

whether a particular licensee violated our rules by performing or failing to perform certain acts.

7. Furthermore, the FCC has many licensees other than broadcasters who are subject to revocation proceedings. Many of our licensees receive authority to use radio as a hobby or convenience for five-year periods in the Amateur Radio and Citizens Band Radio Services. The Commission has more than 350,000 Amateur Band ("ham") licensees and more than 13.8 million Citizens Band (CB) licensees. Clearly, revocation of a CB or an Amateur Band station license would not deprive the licensee of his livelihood. Further, many licensees in such services as the Industrial Radio Service (business, manufacturing, forest products, petroleum, power—See 47 CFR Part 91) and Land Transportation Radio Service (railroads, buses, trucks, taxicabs, automobile emergency—See 47 CFR Part 93) use radio frequencies merely as a means of increasing the efficiency of certain occupations or activities. Thus, revocation of such licensees would not deprive licensees of their livelihood.

8. We also believe that a "clear and convincing" standard of proof for issues of fact in our license revocation proceedings would significantly burden the Commission in its efforts to regulate the licensees under its jurisdiction. The necessity of compiling sufficient evidence in order to insure compliance with a "clear and convincing" standard would likely require increased agency funds and staffing for more investigators, attorneys, and support personnel, to maintain the Commission's performance of its supervisory responsibilities over all of its licensees, including the 13.8 million Citizens Band operators.

9. Thus, we do not believe that the Court of Appeals' determination in *Collins, supra*, that a "clear and convincing" evidence standard is appropriate in certain SEC proceedings concerning allegations of market fraud should be extended to any of this Commission's revocation cases. As we have explained in this Report, broadcasters and radio common carriers subject to revocation proceedings receive a certain protected economic status not available in the market place and should thus remain subject to very high public interest standards of compliance insofar as the performance of their fiduciary duties as trustees of special public resources are concerned. Furthermore, many of our other licensees, such as Citizens Band and Amateur licensees, use their stations primarily for pleasure or as a matter of convenience and thus have very slight private interests at stake in revocation proceedings, compared to the public interest in having responsible licensees. For the reasons we have outlined, we are convinced that the public interest would be best served by use of the usual standard of proof for administrative agencies, namely the preponderance of the evidence test, and that no other factor in this particular case or other

Commission proceedings would warrant the imposition of any higher standard of proof.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX C

F.C.C. 76-582

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of the License of SEA ISLAND BROADCASTING CORPORATION OF S.C. (WSIB), BEAUFORT, SOUTH CAROLINA	Docket No. 19886

APPEARANCES

John H. Midlen, John H. Midlen, Jr., Stanley B. Cohen, and *Howard M. Liberman* on behalf of Sea Island Broadcasting Corporation of S.C.; and *Joseph Chachkin, W. Kennedy Keane* and *P. W. Valicenti* on behalf of the Chief, Broadcast Bureau.

DECISION

(Adopted: June 24, 1976; Released: July 14, 1976)

BY THE CHAIRMAN FOR THE COMMISSION: COMMISSIONER LEE ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT. COMMISSIONER QUELLO NOT PARTICIPATING.

1. The Commission has before it the captioned revocation proceeding against Sea Island Broadcasting Corporation of S.C. (WSIB) (Sea Island), licensee of standard broadcast station WSIB, Beaufort, South Carolina. We designated this proceeding for hearing by an Order to Show Cause and Notice of Apparent Liability (FCC 73-1258), released November 30, 1973, to resolve the following issues: [1]

(a) Whether, and if so, the extent to which the licensee knowingly engaged in fraudulent billing practices in the operation of Sta-

[1] We further provided that if the record did not warrant revocation of WSIB's license, it should also be determined whether an Order of Forfeiture in the amount of $10,000 or some lesser amount should be issued pursuant to Section 503(b) of the Communications Act for violations of Section 73.1205 of the Rules.

tion WSIB in violation of Section 73.1205 of the Commission's Rules;

(b) Whether, in light of all the facts and circumstances pertaining thereto, the licensee has made misrepresentations to the Commission or was lacking in candor as to its billing and bookkeeping practices, including its practice of giving rebates; and

(c) Whether, in light of the information giving rise to the preceding questions, if found to be true, the licensee possesses the requisite qualifications to remain a licensee of the Commission.

2. Conferences and hearings were convened on various dates between January 11, 1974 and January 10, 1975, and the record was closed on the latter date. In his Initial Decision (FCC 75D-19) released May 1, 1975, the Presiding Judge concluded that Sea Island's license should be revoked because the owner and officers of Sea Island had made deliberate misrepresentations to the Commission in attempts to conceal serious violations of the fraudulent billing rules.[2] He also found that the violations of the fraudulent billing rules over a prolonged period of time reinforced his conclusion that the license should be revoked. The Broadcast Bureau filed a statement in support of the Initial Decision on June 16, 1975, and Sea Island filed exceptions to the Initial Decision and a separate brief in support of its exceptions on June 24, 1975. Each party replied to the other's pleadings. Oral arguments in this proceeding were heard on March 30, 1976, and Sea Island filed a motion to correct the transcript of the oral argument on April 16, 1976.[3]

3. Except as modified herein and in the rulings on exceptions set forth in the attached Appendix, we adopt the findings and conclusions in the Initial Decision. The crux of our decision to revoke Sea Island's license is our conclusion that the owner and officers of Sea Island made deliberate misrepresentations to the Commission. Section 312 of the Communications Act authorizes the Commission to revoke a station license for deliberate misrepresentations attributable to that station's licensee. This explicit prerogative given to the Commission by the Communications Act has been affirmed many times by the courts. See, *e.g.*, *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946); *Immaculate Conception Church* v. *FCC*, 320 F.2d 795, *cert. denied*, 375 U.S. 904 (1963); *Lorain Journal Company* v. *FCC*, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966); and *Continental Broadcasting, Inc.* v. *FCC*, 439 F.2d 580, *cert. denied*, 403 U.S. 905 (1971). The Commission insists on complete candor from its licensees and where, as here, that candor has been found lacking in response to official Commission inquiries, the Commission has terminated the license. See, e.g., *Milton Broadcasting Co.*, 34 FCC 2d 1036 (1972); *WPRY Radio Broadcasters, Inc.*, 40 FCC 1183 (1973); and *Nick J. Chaconas*, 28 FCC 2d 231 (1971).

[2] The term "fraudulent billing" has become an abbreviated manner of referring to the various billing practices prohibited by Rule 73.1205. In general, Rule 73.1205 forbids a broadcast licensee from issuing any bill, invoice, or other document which contains false information concerning the amount actually charged for any of its broadcast advertising or which misrepresents the nature and content of such advertising, the quantity of advertising broadcast (i.e., the number or length of advertising messages), or the time of day or the date of such broadcast advertising.

[3] Sea Island's motion is unopposed and the corrections it suggests would clarify the transcript. Therefore we shall grant Sea Island's motion.

4. The record in this proceeding is replete with examples of deliberate misrepresentations by the owner and officers of Sea Island. Charles Bell, Sr., the sole owner, President, and a Director of Sea Island since February 1972 and the general manager of Station WSIB since 1965, has demonstrated a marked propensity for misrepresentations and deceptions. Bell, Sr., displayed a willingness to deceive the Commission in his April 26, 1973 statement to our investigators and during his testimony in this proceeding; and made deliberate misrepresentations in his October 3, 1973 letter to the Commission. Bell, Jr., Vice President, Treasurer, and a Director of Sea Island from March 1, 1972 to April 18, 1974, and a salesman for WSIB during the period of fraudulent billing, lied to our investigators in his April 26, 1973 statement concerning his participation in and knowledge of fraudulent billing practices at Station WSIB.

Fraudulent Billings

5. Sea Island does not dispute the existence and the mechanics of the arrangements found by the Presiding Judge to be violations of our fraudulent billing rules (Section 73.1205 of our Rules). Thus, Sea Island admits that it gave rebates to Palmetto TV and Stereo Center (Palmetto) from April through December 1972 which amounted to half the sums which Palmetto had paid Sea Island for advertising Palmetto's products on Station WSIB.[4] Further, Sea Island concedes that it issued invoices to co-op advertisers of Palmetto, the Sutcliffe Furniture Company and the Country Store which misrepresented the types of advertising broadcast, in that certain commercials were "converted" into a different number of conventional spot announcements in an effort to "simplify" the bills sent to national advertisers.[5] Sea Island also admits that it billed to Sutcliffe as co-op advertising broadcasts which advertised non-co-op products. All of the foregoing billing practices are clear violations of Section 73.1205 of our Rules and amount to what that Section of our Rules describes as fraudulent billing practices.

6. Sea Island's main contention regarding the fraudulent billing issue is that the designation order raised the question of whether "the licensee *knowingly* engaged in fraudulent billing practices" (emphasis added). According to Sea Island, the Broadcast Bureau was required to prove that Sea Island commited technical fraud as defined by South Carolina law; that is, that the defendant made a material misrepresen-

[4] The invoices from Station WSIB which were submitted to co-op advertisers of Palmetto were false since they did not reveal that the compensation WSIB received was only half the amount shown on the invoices because of the 50 percent rebate paid by WSIB to Palmetto. Further, since Palmetto's co-op advertiser had a practice of reimbursing Palmetto 50 percent of the amount invoiced, Palmetto could receive its advertising free.

[5] Sea Island excepts to the Judge's findings that WSIB broadcast Sound-Ads for Palmetto and then billed Palmetto falsely for conventional spot announcements. The record shows that Palmetto sponsored Tides Reports (not Sound-Ads). The error is harmless. The Judge also found that the invoice showed the correct charge to Palmetto (when a rebate was not made), but was inaccurate as to the amount and type of advertising that had been broadcast. The licensee violated Section 73.1205 of the Rules when it converted Palmetto's partial sponsorship of Tides Reports advertisements into conventional spot announcements on its invoice. In addition, the correctness of the amount billed is uncertain because both Sound-Ads and Tides Reports could be pre-empted and the licensee relied on start orders, which would show the number of ads requested, and not on the programming logs, which would have shown the number of ads broadcast. Moreover, none of these findings affect the fact that Palmetto violated Rule 73.1205 by giving rebates to Palmetto.

tation, that he knew it was false when he made it, that he made it with the intention that it should be acted upon, that it was acted upon to the detriment of the party so acting, and that the party acting upon the misrepresentation was damaged thereby.[6] Sea Island relies on *Harvit Broadcasting Corp.*, 37 FCC 2d 60, 63 (Review Board, 1972) as drawing a distinction between a "fraudulent" billing issue and an overbilling issue. In *Harvit*, the petitioner who requested a fraudulent billing issue had not, in the Board's opinion, made sufficient allegations of affirmative fraud. The Review Board therefore added an overbilling issue. The issue as framed by the Board did not include the terms "fraud" or "knowingly," but merely questioned whether the licensee had engaged in billing practices "violative of Section 73.1205 of the Commission's Rules."

7. We categorically reject Sea Island's argument that the Broadcast Bureau had to prove fraud.[7] The Commission has so held previously in *Blackstone Broadcasting Corp.*, 52 FCC 2d 1106 (1975). In that case we plainly stated: "Whether fraud in the technical or affirmative sense is established is not determinative of whether there has been a violation of the rule." Thus, the Commission's 1975 decision defeats the argument of Sea Island that the inclusion of the phrase "knowingly engaged in fraudulent billing practices" in the designation order required the Broadcast Bureau to prove technical fraud. If there is conflict between the Commission's 1975 decision and the Review Board's 1972 decision in *Harvit*, the Commission's decision prevails. The Commission is not bound by Review Board decisions and the Review Board is required to follow Commission precedents.

Misrepresentations and Other Deceptive Statements by the Owner and Officers of the Licensee

8. Although eventually admitting its participation in the rebate scheme, Sea Island did so only after making serious and deliberate misrepresentations and other misleading and deceptive statements to the Commission in attempts to conceal its fraudulent billing practices. Sea Island's deliberate misrepresentations and misleading statements to the Commission occurred as the result of an investigation of Sea Island's billing practices.

9. Between April 25 and 27, 1973, two Commission staff members conducted a field investigation at WSIB. Numerous station records

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[6] Sea Island claims that under the issue designated here, the Bureau has failed to establish fraud in the technical sense because it did not show that any party acted upon any WSIB invoice to its detriment, or filed any claim of damage, or even disapproved of WSIB's billing practices.

[7] Although the Bureau did not have to prove fraud, the record indicates that co-operative advertisers incurred damages as a result of the false invoices issued by Station WSIB. Thus, it is reasonable to assume that Philco-Ford reimbursed Palmetto twice what it would otherwise have paid to Palmetto (or about $1,200 more than Palmetto was due) during the period that Sea Island gave rebates to Palmetto because the reimbursement to Palmetto was based on WSIB invoices sent to Philco-Ford for twice the amount Palmetto had in fact paid to WSIB. As to the Sutcliffe account, the record supports a finding that Sutcliffe's co-op advertisers received invoices including amounts for non-co-op advertising on some occasions. The precise amount is not clear, but the record supports a range of $1,200 to $1,400. The fact that not all of the invoices prepared by Sea Island for Sutcliffe's co-op advertisers were sent to the advertisers diminishes the amount of damages incurred. Nevertheless, some damage was suffered by Sutcliffe's co-op advertisers, who presumably would not have reimbursed Sutcliffe or given it merchandise discounts for advertising expenses which were not incurred on their behalf. Moreover, whether the co-operative advertisers "disapproved" of Sea Island's billing practices is irrelevant to the issue of whether Sea Island violated the Commission's fraudulent billing rule. See *Wharton Communications, Inc.*, 44 FCC 2d 489, 493 (1973).

were collected and examined and various station employees were interviewed, as were Bell, Sr. and Bell, Jr. The investigation centered on possible fraudulent billing, improper trade-outs, and combination rates with a weekly magazine partially owned by Bell, Sr. In their signed statements given to the investigators on April 26, 1973, both Bell, Sr. and Jr. denied any knowledge of fraudulent billing by the station.[8]

10. In a letter dated August 29, 1973, the Commission's staff requested certain accounts receivable records, start orders, and invoices for Palmetto alone, thus focussing their investigation on the Palmetto account. On September 18, 1973, the Commission again wrote Bell about the Palmetto account and explained that a comparison of Station WSIB's accounts receivable ledger sheets for Palmetto with the invoices furnished by Bell to Philco-Ford, Palmetto's co-op advertiser, indicated that WSIB may have engaged in fraudulent billing. The Commission asked for Sea Island's comments on this possibility. By letter of October 3, 1973, Bell, Sr. replied to the Commission's letter of September 18, 1973. In effect, Bell claimed that Sea Island had not engaged in fraudulent billing.

11. When Bell, Sr. composed the October 3, 1973 letter to the Commission, he was in Washington, D.C. After having been warned about the possibility of rebates by his counsel during his visit to Washington, D.C., Bell, upon his return to Beaufort, allegedly for the first time asked his wife and son about possible Palmetto rebates. After he was allegedly first informed about the Palmetto rebates following his return to Beaufort, he received another letter dated October 12, 1973, from our investigatory staff, asking further questions and requesting additional documents concerning the Palmetto account. By letter of November 16, 1973, Bell acknowledged the Palmetto rebates.

The April 1973 Statements

12. Contrary to Sea Island's contentions, the record shows that Bell, Jr.'s statement of April 1973 contains deliberate misrepresentations. Bell, Jr. testified that, at the time he agreed to the arrangement with Sutcliffe, he knew the Sutcliffe arrangement violated the Commission's Rules. Although Bell, Jr. testified that he did not believe the Palmetto rebates were illegal, he clearly misrepresented facts to the Commission investigators when he stated in April 1973 that he had "not participated in double or fraudulent billing at WSIB" and he did not know anyone who had so participated. Bell, Jr. testified that he thought his April 26, 1973 statement was true at the time he made it because the investigators had asked him about the Palmetto account and he did not think the Palmetto scheme violated the Commission's Rules. Bell, Jr. does not explain why he did not mention the Sutcliffe scheme, which he admittedly knew at the time he entered it was a violation of the fraudulent billing rules. In brief, the evidence supports a finding that he purposefully did not reveal the Sutcliffe arrangement.

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[8] The Bureau has not established by substantial evidence that Bell, Sr. knew of the fraudulent billing at WSIB when he made his April 1973 statement to Commission investigators, and therefore the Commission finds that Bell, Sr. did not misrepresent when he stated at that time he was unaware of any fraudulent billing. The record does, however, support findings that Bell, Sr. made misleading statements on other matters in his April 1973 statement. See para. 13, *infra*.

13. Bell, Sr.'s April 1973 statement to our investigators contains several misleading and deceptive remarks concerning his management of Station WSIB. Although Bell, Sr. claimed that he admonished sales personnel to avoid fraudulent billing and called employees attention to articles on the subject in the trade press, Bell, Jr., who functioned primarily as a salesman for the station, could recall only one brief conversation on the subject prior to the April 1973 investigation. Moreover, although Bell, Sr., stated it was rare that he, Mrs. Bell, their son and the vice-president for operations did not have lunch together, where they had an opportunity to discuss "their business affairs," Bell, Jr. testified it was rare for all four of them to have lunch together and both he and his mother testified that luncheon conversations did not deal with business matters.

Bell Sr.'s October 3, 1973 Letter to the Commission

14. Bell, Sr.'s letter of October 3, 1973 to the Commission is replete with deceptions. In that letter, Bell stated that the "billing procedure for this account [the Palmetto account] has been carefully reviewed," that he was "simply unable to resolve certain discrepancies" between the debit and credit figures in the 1972 ledger sheet for Palmetto with the amount actually received from Palmetto,[9] and that the "station employee"[10] [i.e., his wife] who made the ledger entries was not a trained bookkeeper and "is experiencing emotional problems and has no explanation, and is in a transition period of replacement for these duties." Bell's statements that the Palmetto billing procedure had been carefully reviewed and that the person who kept WSIB's books had no explanation for the discrepancies between the ledger sheets and the checks received from Palmetto were contradicted by his own testimony that he did not question his wife or undertake any investigation concerning the Palmetto account until after he had sent the October 3, 1973 letter. Even if he had assumed that his wife had no explanation for the discrepancies, that would not excuse his making the unequivocal statement in the October 3, 1973 letter that she "has no explanation," the clear import of which would mislead the Commission.

15. The Bell family claim that Mrs. Bell had complete control over the billing of WSIB's customers and that she and her son carried out the fraudulent billing arrangements without telling Bell, Sr. about them. Insofar as the Palmetto rebate scheme was concerned, Mrs. Bell claimed that she issued the rebates pursuant to Bell, Jr.'s orders, even though she did not approve of the practice, because she thought they were necessary to retain the Palmetto account and because Bell, Jr. told her to begin the rebate practice during one of Bell, Sr.'s absences from the station when Bell, Jr. was in charge. The Bell family testified that Bell, Sr. was never informed about the Palmetto scheme prior to

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[9] The amounts shown in the Cash Journal as having been received from Palmetto matched the amounts claimed on the invoices to Palmetto, whereas the ledger sheets showed only one-half those amounts.

[10] The "station employee," otherwise unidentified by Bell, was his wife, Elaine E. Bell, the station's office manager and records-keeper since 1965, when her husband acquired 49.33 percent of Sea Island and became general manager. Mrs. Bell was elected Secretary and Director of Sea Island on March 1, 1972, and resigned those positions effective December 31, 1973, following commencement of the current revocation proceeding. (The only other officer and director of Sea Island during the period of March 1972 through December 31, 1973, who was not a member of the Bell family was Wade H. Harvey, who served as Vice-President (Operations) and Director of Sea Island.)

October 1973, when Bell, Sr. allegedly first asked about possible rebates to Palmetto. Bell, Sr. has asserted in effect that a three-day field investigation of WSIB's billing practices by members of the Commission's staff plus two subsequent letters of August 29, 1973 and September 18, 1973, which requested additional documents and explanations concerning the Palmetto account, did not arouse him to make any kind of investigation or to question his wife or son.[11]

16. We cannot believe that Bell, Sr. did not question his wife or son about possible fraudulent billing for over five months following the April 1973 visit to WSIB by Commission investigators. Bell, Sr. testified that he allowed his wife to rubber-stamp his signature on billing invoices and she was in charge of billing during the relevant period of irregular billing practices. Thus, even if Bell was unaware of any fraudulent billing practices in April 1973, he must have known that billing irregularities might have occurred without coming to his attention. Bell is an experienced broadcaster. Upon receipt of the Commission's September 18, 1973 letter he must have known that WSIB's billing practices concerning the Palmetto account, one of Bell's biggest sources of revenue, were being questioned by the Commission. Further, Bell knew that his wife kept the station's records and thus would have to know about any fraudulent billing practices and that his son was the salesman for the Palmetto account. Bell's explanation that he did not question his wife and son because he trusted them does not make sense. If he trusted them, he would have no natural reason for *not* questioning them. Further, Bell's claim that he did not question his wife because of her physical and emotional problems is undermined by his testimony that she was not much better when he questioned her in October than she was in September when he allegedly did not question her. Bell's contention that he delayed questioning his wife about the Palmetto matter because she was ill might have greater weight if she had not continued to perform duties at the station for eight months after the Commission's field investigation of April 1973. If Bell did not investigate after the three-day Commission investigation at WSIB and after receiving two letters from the Commission, it can only be concluded that he purposefully chose to remain ignorant in order to avoid the truth. The Commission has stressed that a licensee has a duty to ascertain the facts before submitting a formal response upon which the

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[11] On February 24, 1975 Sea Island moved to reopen the record to admit certain statements made by members of Station WSIB's sales staff to the Commission's investigators in April 1973, and a February 1975 statement by Bell, Sr. on the question of Bell's knowledge of possible fraudulent billing at Station WSIB at the time of his representations to the Commission and his state of mind between his April 1973 statement to the investigators and his purported discovery of the Palmetto rebates in October 1973. Bell claimed that after the Commission's investigators obtained statements from WSIB's staff in April 1973, he read copies of those statements and relied on the assertions of the staff that they had not participated in fraudulent billing. Sea Island asserted that the statements offered as evidence would fill a void in the record as to the efforts of Bell, Sr. to ascertain whether any fraudulent billing had occurred. The Presiding Judge denied the motion to reopen the record in a Memorandum Opinion and Order, FCC 74M-420, released March 5, 1975. The Judge did not view the statement as being "potentially decisive." Sea Island's October 3, 1973, letter to the Commission, signed by Bell, Sr., listed all the Station WSIB personnel interviewed by the Commission's investigators and stated:

> "In sum each employee interviewed categorically denied any knowledge of or participation in fraudulent billing practices by Station WSIB."

Thus, although the record does not include the statements, except for those of Bell, Sr. and Jr., the record already includes a statement explaining Bell, Sr.'s knowledge of the content of the statements by Station WSIB personnel. Clearly, Bell, Sr.'s reading of these statements does not constitute an independent investigation to ascertain whether any fraudulent billing occurred; and the Judge's refusal to reopen the record was not error.

Commission will rely as substantiated and accurate. See *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1047 (1972); *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183 (1973); and *Nick J. Chaconas*, 28 FCC 2d 231 (1971).

17. In his October 3 letter Bell listed the billings for Palmetto for advertising during the period of June through December 1972 with the dates Palmetto paid its bills, and the dates the checks were deposited in a local bank. Although the Commission had sent Sea Island a copy of a document our staff characterized as WSIB's record of Palmetto's accounts receivable, which showed that the amounts WSIB received from Palmetto were 50 percent of those invoiced to Palmetto's co-op advertiser (Philco-Ford), Sea Island referred to this handwritten document as a mere work sheet which did not appear to be pertinent since it was not used in billing Palmetto. Bell asserted that typewritten ledger sheets were used for billing. He thus implied that the debit entries on the typewritten sheets (or ledger cards) conformed to the amounts billed. This statement that the handwritten accounts receivable did not seem pertinent was a flagrant subterfuge. Mrs. Bell testified that the handwritten ledger sheets were used for billing Palmetto, not the typewritten ones. In fact, the amounts entered on both records were identical.[12]

18. Whether Bell had the typewritten records with him on October 3, 1973, when he was in Washington, D.C. to obtain legal advice in answering the Commission's September 18, 1973 letter is irrelevant. He was aware of their existence at that time. Moreover, Bell had adequate time between his receipt of the Commission's September 18, 1973 letter and his October 3, 1973 response to check the typewritten records to see if they agreed with the handwritten accounts receivable. Had he failed to do that prior to his Washington trip, Bell, Sr. could have telephoned Station WSIB and ascertained whether the typewritten Palmetto records agreed with the handwritten ones. Thus, whether Bell had the typewritten records for Palmetto when he composed his October 3, 1973 letter to the Commission is not decisive. He could have ascertained whether they matched the handwritten ones before he sent the letter and he had the affirmative duty to determine the facts and to supply accurate information to the Commission in these circumstances. See *Milton Broadcasting Co.*, *WPRY Radio Broadcasters, Inc.* and *Nick J. Chaconas*, *supra*. In summary, Bell's claim that he was convinced on October 3, 1973, that the contents of the typewritten records differed from the contents of the handwritten records for a period spanning eight months in 1972 and would demonstrate that Station WSIB did not bill Palmetto for twice the amount the station expected to receive during that eight-month period must be considered sheer fabrication.

Bell's Testimony Concerning His Wife's Continued Involvement With WSIB After 1973

19. Bell, Sr. exhibited a willingness to deceive the Commission when he gave false testimony in September, 1974 regarding his wife's continued involvement with Station WSIB. At the hearing session of Sep-

[12] The licensee claims that the typewritten ledger cards were used for several accounts, including Palmetto, during 1972; that some accounts were never converted to the card system because it was unsuitable; and that Palmetto's records were kept on handwritten as well as typewritten ledger systems. These claims are irrelevant in light of the fact that both records for Palmetto were identical.

tember 23, 1974, Bell was asked four questions concerning the termination of Mrs. Bell's general involvement with Station WSIB. He was first asked whether Mrs. Bell was "still with WSIB," to which he answered in the negative. The second question was when did she cease being employed with WSIB, to which Bell responded: "End of 1973 as I recall." The third question was whether she had terminated all of her involvement with WSIB since the end of 1973, to which Bell answered in the affirmative. The fourth question was whether she had relinquished her positions of the officer and director of WSIB, to which Bell answered in the affirmative. The reasonable import of his answers to those questions is that Bell was asserting his wife was not involved with Station WSIB in any way. In contradiction of this testimony, Mrs. Maureen McCracken, a former employee of WSIB, testified on November 6, 1974, that during the year 1974 Mrs. Bell was at the station Tuesday through Saturday, that she shared the same office with Bell, prepared wage statements and paychecks for employees, and trained some new employees to be traffic managers. On January 10, 1975, Bell's own counsel recalled him to the stand. Bell conceded that he should have given a different response in his earlier testimony regarding Mrs. Bell's continued involvement with WSIB in 1974. Bell explained that in addition to the duties described by Mrs. McCracken, Mrs. Bell wrote 257 out of the 554 checks issued by Station WSIB and maintained the accounts payable (a cash disbursement) ledger. Thus the record establishes that the services rendered by Mrs. Bell in 1974 were, in large measure, [13] the same ones she performed in 1973. [14]

20. During his testimony on January 10, 1975, Bell, Sr. first testified that the services performed in 1974 by Mrs. Bell were merely an accommodation to him because of an "emergency situation" caused by a turnover in personnel who would normally perform check-writing and payroll record-keeping services. Bell subsequently testified that the personnel turnover affected only the position of traffic manager, *i.e.*, the person who did the billing and logging and maintained the accounts receivable, and that none of the persons was hired to write checks, maintain the cash disbursement ledger, or prepare wage statements—all duties performed by Mrs. Bell both before and after her resignation. Bell, Sr. thereafter stated that he had hoped the traffic manager would eventually assume the additional functions of check-writing and maintaining the cash disbursement ledger, and that originally he had planned to assume those functions himself but he got "jammed up" with his other duties.

21. The record plainly shows, therefore, that Mrs. Bell continued most of her late 1973 duties in 1974 and that none of the persons working as WSIB's traffic manager prior to October 1974, was hired to perform the WSIB functions performed by Mrs. Bell in 1974. Bell, Sr.'s

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[13] She performed few billing or accounts receivable functions for WSIB in 1974, but the record contains evidence that she had ceased performing almost all of these functions prior to her resignation on December 31, 1973.

[14] Bell's attempt to explain Mrs. Bell's presence in the office by her work on Bell, Jr.'s weekly magazine, and by his stopping there with her on Saturdays after the trip to Savannah, Georgia, for her to visit her psychiatrist is ineffectual. The record contains no reliable evidence, only estimates by Bell, Sr., as to the number of hours Mrs. Bell worked on the magazine, as opposed to the radio station, and his explanation of her presence at the station on Saturday does not explain her presence on other days of the week.

assertion that he originally planned to perform the services performed by his wife in 1974 can be characterized as one more subterfuge devised to cover up his former deceptions with respect to his wife's continued involvement with the station. Our conclusions with respect to Bell's testimony on these points further demonstrate Bell's propensity to deceive the Commission and confirm our conclusions as to the misrepresentations for which the license is being revoked.

Miscellaneous Matters

22. Sea Island excepts to the judge's failure to consider the corrective billing and supervisory procedures adopted by Bell, Sr. to prevent fraudulent billing in the future, the substantial service rendered by Station WSIB to the community (especially the Black population), and Bell, Sr.'s reputation for truth and veracity in the community as mitigating factors in assessing the appropriate penalty against Sea Island. None of these exceptions has merit. Once the Commission has determined that revocation is warranted for deliberate misrepresentations, the Commission need not consider evidence of remedial measures to prevent fraudulent billing in the future. Further, the station's past meritorious programming becomes irrelevant upon a finding of misrepresentations. See *e.g.*, *Immaculate Conception Church* v. *FCC*, 320 F2d 795, *cert. denied*, 375 U.S. 904 (1963); *KFPW Broadcasting Co.*, 40 FCC 2d 126 (1973). As to Bell, Sr.'s reputation for truth and veracity in the community, the Judge made an explicit finding (paragraph 36 of the Initial Decision) that Bell, Sr. "enjoys an excellent record for probity with the leaders of the community in which he resides." The Commission has made clear, however, that "No matter how unblemished the reputation of the principal in the community, no one is allowed 'one bite' at the apple of deceit." *Grenco, Inc.*, 39 FCC 2d 732, 737 (1973). See also *WMOZ, Inc.*, 35 FCC 202, 238 (1964).

23. Sea Island claims that the degree of proof required of the Bureau in a revocation proceeding should be "clear, unequivocal and convincing." Sea Island relies for this proposition by analogy to language in the Immigration and Naturalization Act as discussed in *Woodby* v. *Immigration and Naturalization Service*, 325 US 276 (1966). The analogy to language in the Immigration and Naturalization case is inapposite and reliance on *Woodby* is wholly misplaced. In *Woodby* the Supreme Court adopted the stricter standard of "clear, unequivocal and convincing" proof because the statute was silent as to the degree of proof required at the administrative level; the question of proof in deportation proceedings had traditionally been left to the Courts; and the higher standard was appropriate because of the unusual hardship of deportation. Unlike a deportation case,[15] the Administrative Procedure Act is applicable here and specifies the degree of proof required at the administrative level for imposition of a sanction. The pertinent provisions of Section 556(d) of the APA clearly require only that a Commission decision be "supported by and in accordance with the reliable, probative, and substantial evidence" of record.

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[15] The APA does not apply to deportation proceedings. *Couto* v. *Shaughnessy*, 218 F2d 758 (2nd Cir. 1955), *cert. denied*, 349 US 952.

24. Sea Island claims that the Commission cannot legally revoke the license of Station WSIB, even upon a finding of deliberate misrepresentation, because the Order to Show Cause and Notice of Apparent Liability, FCC 73-1258, which initiated the hearing, created an unconstitutional situation by providing for alternative sanctions of license revocation and monetary forfeiture. Sea Island appears to be arguing that the different modes of judicial recourse upon forfeiture or revocation tend to discriminate against the licensee by favoring revocation, the sanction with the lesser degree of judicial scrutiny.[16] The licensee's constitutional argument is baseless. Sea Island relies on the faulty premise that the penalties of revocation and forfeiture are interchangeable. They are not. Whether an entity is fit to remain a licensee must be determined independently of whether misconduct warrants forfeiture, and forfeiture is an available sanction only for those kinds of misconduct set forth in Section 503(b) of the Act. Misrepresentations are not misconduct for which a monetary forfeiture may be assessed. Moreover forfeiture, if available, is easier to impose because it requires no administrative hearing—hence the provision for a trial *de novo*.[17] Inclusion of a Notice of Apparent Liability for forfeiture in the document which initiated this proceeding simply afforded the Commission maximum flexibility to impose whatever sanction the record supported.

25. In its Proposed Findings of Facts and Conclusions of Law, the licensee explained with a supporting statement and affidavit of his family physician that Bell, Sr.'s health did not permit him to continue to operate Station WSIB and that he would sell the station within six months after termination of this case in a manner which would permit him to sell it. Bell also submitted a sworn personal statement explaining that he had been negotiating the possible sale of his 100 per cent ownership interest in Station WSIB to his two former partners in that station. Bell asserts that he still owes them about $86,000 for the purchase of their ownership interests in the station; and that since the sales terms for the purchase of their interests did not include any personal liability, for all practical purposes these two creditors would lose nearly all of the amounts due them if Station WSIB's license is revoked. Bell also proposes to sell his 100 percent ownership interest in Station WDOG, Allendale, South Carolina, if the Commission will allow him to sell WSIB. Citing *LaRose* v. *FCC*, 494 F.2d 1145 (D.C. Cir., 1974); *Cathryn C. Murphy*, 42 FCC 2d 346, (1973) and *Second Thursday Corp.*, 25 FCC 2d 112 (1970), Sea Island contends that Bell's proposed sale of Station WSIB would serve the public interest and protect two innocent creditors from losing substantial amounts of money.

26. To allow Bell, Sr., to sell his ownership interest in Station WSIB after finding him guilty of making misrepresentations to the Commission would be to abandon our policy of refusing to permit sales in nonbankruptcy cases where a character qualification issue has been resolved against the assignor. The cases cited by Sea Island are inappo-

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[16] Section 504(a) of the Communication Act provides that recovery of monetary forfeiture requires a trial *de novo*, while Section 402(b)(5) provides that a licensee whose license has been revoked has only a right of appeal.

[17] Indeed, forfeiture may be imposed in addition to any other penalty under Chapter 5 of Title 47.

site. Specifically, *LaRose* v. *FCC*, *supra*, and *Second Thursday Corp.*, *supra*, both involved licensees who were bankrupt. Although the Commission allowed the licensee in *Cathryn C. Murphy*, *supra*, to sell the station despite adverse character findings, we did so only when faced with what we called "unusual circumstances." In *Cathryn C. Murphy*, the licensee who sold the station made no profit and the licensee's illness diminished her responsibility for her actions. Further, in *Cathryn C. Murphy*, the licensee's personal physician offered the prognosis that because of the physical and mental damage resulting from acute alcoholism, Mrs. Murphy would never be able to accept the responsibilities of conducting a business. 42 FCC 2d 346, 347 (1973). Thus, in contrast to the *Murphy* case, Bell's misrepresentations are not attributed to an illness and his contemplated sale of station WSIB would return him a substantial profit.[18] There are no unusual or extraordinary circumstances in this case which would justify a retreat from the Commission's policy of refusing to "abdicate its responsibility to protect the public interest because of sympathy." *Milton Broadcasting Co.*, 34 FCC 2d 1036, 1043 (1972).

Conclusion

27. Our decision to revoke Sea Island's license is based primarily on the fact that Sea Island has shown a classic pattern of making deliberate misrepresentations and other misleading and deceptive statements to us when it believed it could effectively conceal suspected wrongdoing. Further, the kinds of fraudulent billing engaged in by Sea Island were serious and reinforce our conclusion to revoke Sea Island's license. In short, the effective regulation of the communications industries under our jurisdiction is premised on our ability to depend on the accuracy and truthfulness of our licensee's representations to us. Once we find that we cannot rely on a licensee's representations to us, the only suitable penalty is revocation of the license.

28. Accordingly, IT IS ORDERED, That the transcript of the oral argument in this proceeding held before the Commission on March 30, 1976 IS CORRECTED as set forth in Sea Island Broadcasting Corporation of S.C.'s Motion to Correct Transcript of Oral Argument, filed on April 16, 1976.

29. IT IS FURTHER ORDERED, That the license of Sea Island Broadcasting Corporation of S.C. for Station WSIB, Beaufort, South Carolina is REVOKED.

30. IT IS FURTHER ORDERED, That Sea Island Broadcasting Corporation of S.C. IS AUTHORIZED to continue to operate Station WSIB until 12:01 a.m., October 1, 1976, to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks judicial review of our Decision, it is authorized to continue to operate Station WSIB until thirty (30) days after final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

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[18] Bell states that he purchased his former partners' 49.32 percent ownership interest in Sea Island for $106,530 and that the fair market value of Station WSIB would be about $215,000.

APPENDIX D

F.C.C. 77-330

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of the License of SEA ISLAND BROADCASTING CORPORATION, OF S.C. (WSIB) BEAUFORT, SOUTH CAROLINA	Docket No. 19886

MEMORANDUM OPINION AND ORDER

(Adopted: May 11, 1977; Released: May 20, 1977)

BY THE COMMISSION: COMMISSIONERS HOOKS AND QUELLO CONCURRING IN THE RESULT; COMMISSIONER LEE NOT PARTICIPATING.)

1. In a Decision, 60 FCC 2d 146, released July 14, 1976, the Commission revoked the license of Sea Island Broadcasting Corporation of S.C. (Sea Island) for Station WSIB, Beaufort, South Carolina. Now the Commission has before it: (a) a petition for partial reconsideration of that decision filed August 13, 1976 and a supplement thereto filed August 23, 1976 by Sea Island; (b) a "Petition For Permission To Continue Broadcasting," filed August 13, 1976 by a group identifying itself as "The Black Citizens of Beaufort County;" [1] (c) an opposition to Sea Island's petition for partial reconsideration filed August 26, 1976 by the Broadcast Bureau; and (d) a reply to the Broadcast Bureau's opposition filed September 14, 1976 by Sea Island.

2. Sea Island makes three major arguments for reconsideration: (1) the Commission erred when it refused to permit Charles E. Bell, Sea Island's sole stockholder, to sell Station WSIB; (2) the Commission's Decision in this case was predetermined; and (3) news leaks of the Commission's Decision prejudiced Sea Island's due process rights. [2] Insofar as Mr. Bell's proposed sale of station WSIB is concerned, Sea

[1] The Black Citizens group is not a party to this proceeding and has not sought intervention. Therefore, their petition will be dismissed. We will nevertheless consider the substance of their petition as it relates to the appropriateness of revocation as a sanction in this case.

[2] Sea Island notes that its petition is narrowly drawn to avoid repetition of arguments already made to the Commission and included in Sea Island's Notice of Appeal (No. 76-1735) in this case, which was filed August 12, 1976 in the United States Court of Appeals for the District of Columbia Circuit.

Island has not raised any significant new arguments which were not considered in our Decision.[3] It is well established that reconsideration is not granted "merely for the purpose of again debating matters on which [the Commission] has once deliberated and spoken." *WWIZ, Inc.*, 37 FCC 685, 686, affirmed *sub nom. Lorain Journal Company* v. *FCC*, 351 F.2d 824, 5 RR 2d 2111 (D.C. Cir., 1965), *cert. denied* 383 U.S. 967 (1966).

3. We observe, however, that Sea Island has now changed its original proposal to sell WSIB to the degree that it now promises to give priority to Black community ownership in seeking out a buyer, and if Black buyers cannot be found, to proposed owners who would maintain the "present service to the less privileged." Sea Island argues that the public interest would be served by the continued operation of Station WSIB without interruption as an outlet and voice for the less privileged members of the community. A group identifying itself as "The Black Citizens of Beaufort County" has filed a "Petition For Permission To Continue Broadcasting." The group, six persons including one Sea Island director, requests that WSIB be allowed to remain on the air in light of its meritorious service to the community and its program of providing equal employment and career opportunities for Black residents. Neither Sea Island nor the citizens group has presented any compelling reasons for overturning our long standing policy of revoking the license of an entity found to have made serious and deliberate misrepresentations to us. See, *e.g.*, *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946), *Immaculate Conception Church* v. *FCC*, 320 F.2d 795, *cert. denied*, 375 U.S. 904 (1963) and *Milton Broadcasting Co.*, 34 FCC 2d 1036 (1972). As our Decision made clear, the record overwhelmingly supports the conclusion that Sea Island not only engaged in false billing in violation of Rule 73.1205, but made deliberate misrepresentations and other misleading and deceptive statements to the Commission in an attempt to conceal the false billing. If we were to renew Sea Island's license for the limited purpose of allowing the sale of Station WSIB, even to a minority group, the benefit which would flow to Mr. Bell, the sole owner and major wrongdoer, would undermine our regulatory authority by removing most of the deterrent effect which revocation of a broadcast license should have on our licensees.[4]

4. Sea Island raises two new matters that it believes require the

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[3] We understand that his application for authority to sell Station WDOG is not contingent upon his receiving our permission to sell Station WSIB. The proposal to sell WDOG is irrelevant to the revocation of the license of WSIB. Further, however, Sea Island defines and calculates "profit" from a sale of WSIB, there is no doubt that Bell would enjoy a substantial benefit if allowed to sell the station compared to his situation if the license is revoked.

[4] A like policy is followed with respect to renewal proceedings. Where character issues are resolved adversely to the renewal applicant, we will not grant renewal merely to allow an assignment of license to a qualified assignee. Any such renewal grant would seriously undermine our regulatory authority, thus significantly diminishing the accountability of licensees for serious violations of the Communications Act and/or our Rules and Regulations. See discussion in text. Moreover, if a determination is made that the license should not be renewed, the applicant has nothing to assign. *Jefferson Radio Company, Inc.* v. *F.C.C.*, 119 U.S. App. D.C. 256, 340 F.2d 781. Only where exceptional circumstances are presented which make evident that compelling equitable considerations clearly outweigh such action do we grant renewal to such an applicant on condition that the license be assigned to a qualified assignee. See *Cathryn C. Murphy*, 42 FCC 2d 346. It was by reason of these exceptional circumstances and compelling equitable considerations that we granted a renewal application in conjunction with the grant of an assignment application (BAL-8713) in *Northwestern Indiana Broadcasting Corporation*, Docket No. 20604, FCC 77-329, adopted today.

Commission to reconsider the decision reached in this case: the impartiality of the Commission in reaching its decision and news leaks as to the decision. Sea Island makes the general allegation that the Commissioners deciding this case did not act as a properly neutral and impartial tribunal, but rather had predetermined their decision based on their commitment to act severely toward any licensee involved in fraudulent billing. The licensee quotes language from a speech by the Chairman of this Commission to the National Association of Broadcasters in March 1974, in which he promised severe action in fraudulent billing cases. In addition, Sea Island refers to a June, 1975 statement by the Chairman which accompanied a Notice of Proposed Rulemaking in regard to amending Rule 73.1205 (53 FCC 2d 900, 906) and which was joined in by four other Commissioners, wherein the Chairman expressed his commitment to eliminate fraudulent billing practices by "taking every action I can to facilitate this objective." Further, Sea Island claims a cursory review of the transcript of the oral argument before the Commission in this case held on March 30, 1976 reflects the Commission's "prosecutorial" attitude and predetermination to revoke Sea Island's license.

5. Sea Island's contention is totally wanting in merit. Our decision in this case was not prejudged. The fact that individual Commissioners had expressed their desire to eliminate fraudulent billing practices in the broadcast industry did not prevent us from making a dispassionate judgment as to whether a specific licensee had engaged in billing practices which violate our Rules. Moreover, our Decision in this case is based primarily on the fact that Sea Island made deliberate misrepresentations and other misleading and deceptive statements to us in attempts to conceal suspected wrongdoing on its part.

6. Sea Island's assertion that any reader of the transcript of its oral argument before the Commission could conclude that we did not give Sea Island a fair opportunity to present its arguments does not rise above bald allegation. Oral argument before the Commission after a full evidentiary hearing has been held by a Presiding Judge, an Initial Decision has been issued, and exceptions to that Initial Decision have been filed, as in this proceeding, is not a requirement of due process. See 47 USC 409(b). Hearing oral argument in a proceeding such as this provides the Commissioners with the opportunity to ask the parties probing questions on any matters of record, including the evidence and the findings and conclusions of the Presiding Judge as well as the significant arguments raised in the written pleadings of the various parties. Sea Island's complaints that it was interrupted and asked "prosecutorial" questions about evidence in the record and certain findings and conclusions of the Presiding Judge clearly lack any substance.

7. Nor is there any substance to Sea Island's allegation that the Commission has shown its inclination to impose severe penalties in fraudulent billing cases in a retroactive, *ex post facto* manner. Apparently, the licensee is asserting that the Commission is imposing severe penalties for fraudulent billing that occurred prior to the Chairman's statement of March, 1974. Sea Island cannot legitimately claim that the Commission did not give sufficient warnings about fraudulent billing prior to the offenses committed by Sea Island in 1972. See, *Fraudulent*

Billing Practices, 1 FCC 2d 1068 (1965); *In re Applicability of Fraudulent Billing Rule*, 1 FCC 2d 1075 (1965); *Fraudulent Billing Practices*, 23 FCC 2d 70 (1970); *In re Applicability of Fraudulent Billing Rule*, 23 FCC 2d 303 (1970). Moreover, the Commission's Decision, which considers separately the evidence on the issues of double billing and misrepresentation and lack of candor, reflects a weighing of the evidence that belies Sea Island's questioning of the Commission's ability to treat fairly representations that concern billing because of a bias on the subject of billing.

8. Sea Island's contention that news leaks of the Commission's decision potentially taint this case has no validity. Sea Island remarks that the June 28, 1976 issue of *Broadcasting*[5] contained a news report that we had revoked the license of WSIB. The licensee claims the details of the *Broadcasting* item reflect access to or a conversation with Commission personnel having access to our Decision in this case prior to its release. Further, the licensee states that the Commission's internal investigation in the Western Communications, Inc.—Las Vegas Valley Broadcasting Co. case (Docket Nos. 19519 and 19581) includes a Memorandum of Interviews Regarding Investigation of Alleged Employee Misconduct (KORK) dated April 14, 1976, which states that a conversation occurred between a Commission employee who, under our rules, is in the category of "decision-making personnel" and a *Broadcasting* reporter who sought information concerning the Sea Island case. Sea Island also notes that our written Decision in this case was not adopted until more than two months after the conversation referred to in this Memorandum of Interviews. Because of the sequence of events, Sea Island requests that we conduct an investigation adjudicatory in nature with Sea Island as a party before an impartial presiding officer and that his decision be binding upon us.[6] The licensee believes that such an investigation is necessary because "news leaks tend to freeze a Commission Decision and the positions of individual Commissioners participating therein to the legal prejudice of Sea Island."

9. The apparent news leaks referred to by Sea Island could not have improperly influenced our decision in this proceeding. Accordingly, an investigation would be inappropriate. The item about our decision to revoke WSIB's license in the June 28, 1976 issue of *Broadcasting* was published after the Commission had adopted the Decision on June 24, 1976 and thus the item clearly did not influence the vote in this case.[7] As to the conversation between an employee of the Commission considered to be one of our "decision-making personnel" as defined in our rules and a *Broadcasting* reporter, it is unclear whether the employee said anything about the Commission's decision in this case when the admitted conversation occurred; and even if he did, *Broadcasting* did not publish such information until its June 28, 1976 edition, after the Commission had adopted its Decision. In short, even if a member of

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[5] *Broadcasting* is a weekly news magazine concerned with communications matters.

[6] Sea Island also asks that we stay any action in this proceeding, pending a decision in the adjudicatory investigation. This request is rendered moot by our determination that no investigation is necessary.

[7] Although the decision was not released until July 14, 1976, the release date is significant only for counting the days within which Sea Island can appeal our Decision or ask for reconsideration of the Decision. The task of releasing copies of the Decision was a purely ministerial staff function.

Broadcasting's staff knew the Commission's decision as early as April 1976, no information was published in *Broadcasting* which would "freeze" the Commission's ultimate decision in this matter. Thus, although we deplore all instances where information concerning Commission action in adjudicatory matters is obtained from our staff before being officially released to the public, Sea Island's rights have not been prejudiced by the *Broadcasting* item or by any information which might have been disclosed by one of our decision-making personnel to a *Broadcasting* reporter in April 1976.

10. Accordingly, IT IS ORDERED:

(a) That the "Petition For Permission To Continue Broadcasting" filed August 13, 1976 by "The Black Citizens of Beaufort County" IS DISMISSED; and

(b) That the petition for partial reconsideration filed by Sea Island Broadcasting Corporation of S.C. on August 13, 1976 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX E

F.C.C. 75D-19

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of: Revocation of the license of SEA ISLAND BROADCASTING CORPORATION OF S.C. (WSIB), BEAUFORT, SOUTH CAROLINA	Docket No. 19886

Appearances

John H. Milden, John H. Milden, Jr., Stanley B. Cohen, and *Howard M. Siberman* on behalf of Sea Island Broadcasting Corporation of S.C.; and *Joseph Chachkin* and *W. Kennedy Keane* on behalf of Chief, Broadcast Bureau, Federal Communications Commission. To be associated with FCC 76-582, Vol. 60(2d), page 146.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CHESTER F. NAUMOWICZ, JR.

(Issued: April 22, 1975; Released: May 1, 1975)

Preliminary Statement

1. On November 30, 1973, the Commission released an Order to Show Cause and Notice of Apparent Liability in the matter of the revocation of the license of Sea Island Broadcasting Corporation of S.C. for Station WSIB, Beaufort, South Carolina. The order of designation raised the following questions:

"1. Whether, and if so, the extent to which the licensee knowingly engaged in fraudulent billing practices in the operation of Station WSIB in violation of Section 73.1205 of the Commission's Rules.

"2. Whether, in light of all the facts and circumstances pertaining thereto, the licensee has made misrepresentations to the Commission or was lacking in candor as to its billing and bookkeeping practices, including its practice of giving rebates.

"3. Whether, in light of the information giving rise to the preceding questions, if found to be true, the licensee possesses the

requisite qualifications to remain a licensee of the Commission."

The order of designation also contained a notice of apparent liability in the maximum sum of $10,000.

2. On November 30, 1973, the Broadcast Bureau released a Bill of Particulars detailing the allegations underlying the questions presented by the Order to Show Cause.

3. Conferences and hearings were convened on various dates between January 11, 1974 and January 10, 1975, with the record being closed on the latter date. The filing of proposed and reply findings of fact was concluded by April 14, 1975.

Findings of Fact

4. Since February of 1972, the licensee has been wholly owned by Mr. Charles E. Bell, who serves as President and Director of the corporation, and General Manager of the station. Bell has had ownership interests in broadcast licensees since 1960. His wife, Elaine E. Bell, has served as the station's bookkeeper since 1965. On March 1, 1972, she was elected Secretary and Director of the licensee. However, she resigned from those positions effective December 31, 1973. Mr. Bell's son, Charles E. Bell, Jr., was employed at WSIB, primarily as a salesman, throughout the relevant period. On March 1, 1972, he was elected Vice President, Treasurer and Director of Sea Island. He resigned those positions effective April 18, 1974.

Issue No. 1: Fraudulent Billing

5. In April of 1972, Mr. Herman Smith, proprietor of Palmetto TV and Stereo Center, advised Mr. Bell, Jr., that his advertising costs were too high, and that some adjustment would have to be made. The record is unclear as to which man suggested the nature of the adjustment, but from April through December of 1972 (with the possible exception of May) WSIB issued false monthly bills to Palmetto.

6. The scheme involved WSIB issuing a bill to Palmetto, and Palmetto paying the full amount billed. Thereafter, WSIB would rebate to Palmetto 50% of the amount paid.

7. Palmetto sent the bills it received from WSIB to its distributor, Brown-Rogers-Dixson Company which in turn billed the manufacturer, Philco-Ford Corporation. Since Palmetto was receiving 50% co-op advertising credit from its supplier, the 50% rebate it received from Palmetto permitted it to receive its advertising for nothing.

8. The total amount involved was not inconsequential relative to station revenues. The 1972 rebates to Palmetto totalled $2,439.50 out of total revenues for the year of $113,218.

9. The fact that Bell, Jr. initiated the rebate scheme at a time he was an officer of the licensee corporation is of obvious significance. However, the heart of WSIB's defense is the claim that Bell, Sr., the actual owner of the corporation, did not have knowledge of it until October, 1973. All three Bells testify that this was the case. However, that testimony is found to be implausible.

10. Mrs. Bell asserts that her son did not actually explain the arrangement to her. He merely told her that the payments were necessary in order to retain the Palmetto account. She recognized that the

arrangement was out of the ordinary. However, since Bell, Sr. had left their son in charge while he was out of the area on business, she felt Bell, Jr. was entitled to make the decision. Accordingly, she drew to Palmetto one of a number of checks which Bell, Sr. had signed in blank to pay bills.

11. The foregoing is not unbelievable. Bell, Jr.'s decision to retain a threatened account by rebating is understandable if not commendable. His mother's compliance with his instructions to draw the check is not unnatural in her husband's absence. What is incredible, and not convincingly explained, is their claimed failure to tell Bell, Sr. about the incident on his return, and their claimed failure during the following months during which additional rebate checks were issued to acquaint him with the situation.

12. It is claimed that Bell, Sr. was not told because he did not communicate well with his son, and it was feared that disclosure would anger him. Such explanation is unlikely. On the one hand, if Mrs. Bell truly believed that her son was acting within the scope of his delegated authority, she had no reason to fear that disclosure would anger his father. On the other hand, if she truly believed that disclosure would anger Bell, Sr. she could not have believed that the Palmetto arrangement was within the scope of the son's authority. In either case she was confronted with a highly unusual situation involving the regular expenditure of a material portion of the station's receipts. It is simply unnatural that she would have said nothing to her husband, especially since she must have known, as must Bell, Jr., that the situation would be immediately apparent to Bell, Sr. at any time he conducted even a superficial review [1] of the station's expenditures. The Bells' testimony that Bell, Sr. was unaware of the rebating while it was going on is not accepted as true.

13. The rebates to Palmetto did not constitute the only irregularity in WSIB's billing practices. The station had a spot rate of $1.50 for 60-second announcements and $1.20 for 30-second announcements. However, it also broadcast what it called Sound Ads. Sound Ads were 11 or 12-second announcements, usually broadcast in sets of four from time to time throughout the day. The charge was $30 per month for each segment of the Sound Ad.

14. In preparing invoices for Palmetto, WSIB converted the Sound Ads actually broadcast into spot announcements. The conversion was accomplished by dividing the charge for Sound Ads broadcast by the spot rate, thereby yielding a specific number of spots. The invoice indicated that the resulting number of spots had been broadcast rather than the number of Sound Ads that had actually been broadcast. Hence, the invoice showed the actual charge to Palmetto, but was inaccurate as to the amount and type of advertising that had been broadcast. This practice was originated by Mrs. Bell and was followed in the belief that co-op advertisers might not understand bills for announcements other than conventional spots.

15. The conversion into conventional spots of other types of advertising on behalf of Palmetto is shown to have occurred in January,

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[1] The checks to Palmetto were properly stubbed. Both the stubs and the cancelled checks were available to Bell, Sr.

1971; April through December of 1972; January through April of 1973; and June through December of 1973.

16. A similar practice was followed with the bills of another advertiser, Sutcliffe Furniture Company. However, in the case of Sutcliffe, WSIB went one step further. It billed to Sutcliffe as co-op advertising broadcasts which did not qualify for that designation. In addition to its furniture store, Sutcliffe owns two other businesses which advertise on WSIB, a laundromat and a grocery store. Neither sells products for which Sutcliffe has a co-op advertising agreement. However, both businesses were advertised via WSIB Sound Ads. With respect to such advertising WSIB furnished Sutcliffe two invoices. One, for Sutcliffe's own files, showed what was actually broadcast. The other, for Sutcliffe's co-op advertisers, converted the Sound Ads to conventional spots and showed them all as having been broadcast on behalf of the furniture store. The record indicates that between May, 1972 and October, 1973 Sutcliffe was furnished false invoices totalling over $1,400 showing co-op advertising that was not actually broadcast on behalf of products of the co-op sponsors.[2]

17. In September of 1972, the owner of the Country Store, a grocery store with associated service station, undertook a promotional campaign on behalf of his gasoline sales. His supplier, Southland Oil Company, agreed to pay 50% of the cost. The owner of the Country Store in company with a representative of Southland Oil reached an agreement with WSIB for a promotional mix of 30-second spots and Sound Ads. However, when the invoice was sent it indicated that all of the broadcasts had been spots. The total amount involved was approximately $130.00.

Issue No. 2: Misrepresentation

18. Between April 25 and 27, 1973, two Commission staff members conducted a field investigation at WSIB. During the three-day period the investigators interviewed both Bell, Sr. and Bell, Jr. as well as various employees, and examined numerous station records. Statements were taken from all or most of those interviewed. The context of these statements makes it apparent that the investigation centered on suspected fraudulent billing, improper trade-outs, and combination rates with the Beaufort Shopper owned by Mr. Bell, Jr.

19. In the signed statements which Bell, Sr. and Jr. gave the investigators each denied any knowledge of fraudulent billing by the station. Bell, Jr.'s statement was obviously false since it was he who had made the arrangements for the fraudulent bills. It is found that Bell, Sr.'s statement was equally false.

20. As found at paragraphs 10-12, *supra*, the presiding Judge regards it as improbable that Mr. Bell, Sr. was unaware of the Palmetto rebates while they were being paid. It is even more incredible that he remained ignorant after the investigation commenced.

21. Field investigations by the Complaints and Compliance Division of the Broadcast Bureau are not an everyday occurrence in the life of an average licensee. The presence of two investigators for three days

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[2] The record indicates that Sutcliffe did not always forward the false invoices to its co-op advertisers for credit. However, this fact is irrelevant. The essential point is that Sea Island issued false invoices, and what Sutcliffe may have done with those invoices is without significance.

could not have failed to capture Mr. Bell's full attention. Their questions and the documents they sought made their area of interest apparent. Assuming *arguendo* that Bell was unaware of any wrongdoing at the time they arrived, it would have been wholly unnatural for him not to have launched his own immediate investigation.

22. Moreover, the first targets of that investigation would be obvious. Bell, as an experienced broadcaster, must have realized that the sort of offenses being investigated were those which ordinarily originate with a station's salesmen. He knew that his son was primarily a salesman, but had functioned as the station's manager during his own absences in past months. He must have known that the sort of offenses being investigated could only occur with the cooperation of the individual responsible for the station's billing. He knew that his wife was the station's bookkeeper and functioned as office manager. It is simply inconceivable that he would not have discussed the matter with them while the investigators were there and before he signed his statement. Yet, he asserts that neither at that time nor for five months thereafter did he question either of them.[3] Such insouciance surpasses belief.

23. By letter of August 29, 1973, the Commission requested additional records from WSIB. The records requested related specifically to Palmetto. Bell sent the records. However, although he knew that Palmetto was his son's account, he claims that he did not question either Bell, Jr. or Herman Smith, proprietor of Palmetto.

24. By letter of September 18, 1973, the Commission advised WSIB that it suspected fraudulent billing on the Palmetto account. It enclosed copies of WSIB's Palmetto accounts receivable for 1972 and copies of the WSIB invoices which had been supplied to Philco-Ford, Palmetto's co-op advertiser, for June through December, 1972, and asked Bell to comment.

25. By letter dated October 3, 1973, Bell replied.[4] In pertinent part he stated:

> "With reference to the 1972 ledger work sheet for Palmetto TV and Stereo Center (characterized in the Commission's letter as 'WSIB' Palmetto accounts receivable for 1973) the licensee is simply unable to resolve certain discrepancies in the debit and credit figures with the amounts of the Palmetto checks for the period from June through December 1972. The station employee who made those entries is not a trained bookkeeper, is experiencing emotional problems and has no explanation, and is in a transition period of replacement for these duties. In any event, this work sheet appears not to be pertinent as it was not utilized in the Palmetto TV billing. A typewritten ledger sheet is used for such billing."

26. Bell's letter can only be described as brazen. The Commission had sent him copies of records demonstrating that the amounts he had received from Palmetto were 50% of those he had invoiced to Palmetto's co-op advertiser. To any experienced broadcaster such documents almost certainly spell double billing,[5] and since the Commission had

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[3] Bell claims he did not discuss the matter with his wife because she was unwell, and he did not wish to place her under greater pressure. This contention would be entitled to greater weight if Mrs. Bell had not continued to perform the rest of her duties at the station for an additional eight months. No explanation is offered as to why Bell, Jr. was not questioned.

[4] The letter was drafted by WSIB's attorney. However, counsel relied entirely on information supplied him by Bell, Sr.

[5] Double billing is a form of fraudulent billing whereby a co-op advertiser is invoiced for a sum greater than the broadcaster expects to receive from the local account which actually placed the advertising. The details by which such a result is achieved may vary from case to case.

sent them to him Bell must have known that the Commission was aware of the situation. His continuing denial constitutes an attempt to obfuscate the situation.

27. Moreover, Bell's statement that "the station employee who made these entries . . . has no explanation" conflicts with his testimony during the hearing. The "station employee" was his wife. During the hearing he testified that he had not discussed the matter with her when he wrote the letter, and did not do so for approximately a week thereafter. It is found that neither the statement in the letter nor the subsequent testimony is worthy of belief.[6]

28. It has heretofore been found that Bell's previous claims of ignorance are incredible. However, even if, for the sake of argument, those statements are accepted as true, his claim that he answered the Commission's letter without checking with his wife is beyond the bounds of common sense. He had documents in front of him that demonstrated double billing. He knew that she had been responsible for the preparation of those documents. He simply could not have failed to ask her for an explanation. His claim that he did not cannot be accepted.

29. Mr. Bell testified that during discussions with his communications counsel relative to the preparation of the October 3, 1973 letter the possibility of rebates first arose. When he returned to South Carolina he discussed the matter with his wife and son, and they acknowledged what had transpired. However, he did not immediately undertake to modify his representations to the Commission.

30. On October 12, 1973, after Mr. Bell claims to have at last learned of the rebates, the Commission addressed another letter to WSIB. It requested certain documents and explanations.

31. On November 9, 1973, WSIB replied through counsel. Although Mr. Bell was made aware of the contents of the reply before it was submitted, the letter did not refer to his then admitted knowledge of the rebates. Finally, by letter to the Commission dated November 16, 1973, Mr. Bell acknowledged the Palmetto rebates. However, the letter did not disclose the irregularities in connection with the Sutcliffe billings discussed at paragraph 16, *supra*. Bell, Jr. asserts that he did not disclose this arrangement to his father until April of 1974.

32. One further matter requires discussion, although it is not within the scope of the issue, because it has influenced the opinion of the presiding Judge with respect to the candor of Mr. Bell. On February 1, 1974, Sea Island filed an Ownership Report stating that Mrs. Bell had resigned as an officer and director of the corporation effective December 31, 1973. On May 28, 1974, a Statement for the Record was filed indicating that Bell, Jr. had resigned as an officer and director effective April 18, 1974, and severed all employment relationships with the station on April 30, 1974. These actions were taken in order that WSIB could claim that the persons responsible for the fraudulent billing had been disassociated from the operation of the station.

33. In the course of his testimony Mr. Bell answered in the affirmative to a question as to whether his wife had "terminated all of her

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[6] This finding is reinforced by Bell's assertion that the WSIB work sheets which were sent him were not pertinent. In fact, WSIB did keep two accounts receivable work sheets on the Palmetto account, one handwritten and one typewritten. However, as he well knew, both contained the same data, and either would be equally pertinent in ascertaining the facts.

involvement" with the station. Further examination revealed that this answer was untrue. Although Mrs. Bell was no longer a principal or employee of the station, and although she no longer worked as many hours as before or received a salary, she continued to perform duties essentially the same as those she performed at the time of her resignation.[7]

34. The importance of the foregoing finding lies not in the fact that Mrs. Bell continued to serve the station. The Commission has no requirement that an erring employee be discharged, and certainly there is no requirement that action be taken which would strain family ties. The point is that Mr. Bell took an action designed to imply that he was so shocked by his discovery of malmanagement that he was inspired to adverse action even against his closest family.

35. Plainly, if such an action is to be credible Bell had an obligation of absolute candor. The simple failure to disclose affirmatively that Mrs. Bell continued to perform substantial duties, albeit as a wife rather than as a business associate or employee, constituted evasiveness. However, Bell went further. While undergoing cross-examination plainly designed to elicit whether Mrs. Bell retained any connection to the station he falsely denied it. Such action is indicative of a continuing willingness to deceive the Commission, and lessens still further the confidence which may reasonably be placed in his version of events.

36. WSIB offered evidence as to Mr. Bell's character and as to the service which his station has rendered to the community. It is found that Mr. Bell enjoys an excellent record for probity with the leaders of the community in which he resides. It is further found that the station has well served the needs of diverse groups within the community.

Conclusions

Issue No. 1: Fraudulent Billing

37. From January, 1971 to December, 1973, WSIB engaged in fraudulent billing of one type or another. In January, 1971; April, 1972 through April, 1973; and June, 1973 through December, 1973, co-op advertisers of Palmetto TV and Stereo Center were furnished invoices which falsely indicated that specific numbers of 30- or 60-second spot announcements had been broadcast when in fact what had been run was a different number of approximately 10-second commercials within the Sound Ad format. Between May, 1972 and October, 1973 similar false invoices were supplied to co-op advertisers of Sutcliffe Furniture Company. These invoices were rendered even more egregious because many of the Sound Ads which were broadcast and invoiced as 30- or 60-second spots to the co-op advertisers were on behalf of Sutcliffe businesses which did not handle the products of the co-op advertisers involved. From April through December of 1972 invoices were submitted to co-op advertisers of Palmetto which were false in that they failed to reveal that the actual compensation WSIB was to receive was only half that shown on the invoice due to the 50% rebate being paid by WSIB to Palmetto.

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[7] Bell, Jr. also continued to serve the station on occasion. However, the record indicates that his services were casual, insignificant and infrequent. It is found that the claim that his actions were merely an occasional accommodation of a father by a son is essentially true.

38. Each of these invoices was violative of Rule 73.1205 in that it contained information that was false either as to the amount actually charged by the licensee for the broadcast advertising for which the invoice was issued or misrepresented the quantity of advertising actually broadcast.[8]

39. The violations were initiated by Charles Bell, Jr. and/or Elaine Bell. At the time each was an officer and director of the licensee corporation.

40. Charles Bell, Sr., the owner, President, Director and General Manager of the WSIB operation denies knowledge of the fraudulent billing while it was going on. His testimony has not been accepted as true. However, even if he had been believed, he would be held responsible for the activities of his wife and son in their capacity of corporate principals and employees.

41. WSIB is a small station with a small staff. Bell, Sr. was General Manager and present at the station during much of the time. The records were open to him, and the most casual inspection thereof would have revealed the improper billing. A glance at the check stubs would have disclosed the rebates. A superficial comparison of the logs and the invoices would have shown that on certain accounts Sound Ads were being invoiced as spots. "It is obvious that a minimal degree of responsible supervision . . . could have averted the . . . fraud," *Continental Broadcasting, Inc.*, 15 FCC 2d 120. Under such circumstances, even if it had been found that the fraud had occurred without Bell's knowledge, he would be held fully responsible for the wrongdoing of his subordinates.

42. So far as is known to the presiding Judge the Commission has not heretofore denied a license solely because of violations of Rule 73.1205. However, in *Wharton Communications, Inc.*, 44 FCC 2d 489, fraudulent billing in conjunction with other improprieties was found sufficient to deny renewal of a license. The violations of Rule 73.1205 in this case will be considered together with the conclusions on the misrepresentation issue in determining the appropriate action.

Issue No. 2: Misrepresentation

43. It is undisputed that the denial of knowledge of fraudulent billing contained in the April, 1973 statement of Mr. Bell, Jr. constituted a knowing misrepresentation by an officer and director of the licensee corporation. Moreover, even if he had been a mere employee, the licensee could not escape responsibility for his misrepresentation. "While certain duties may be performed by station employees pursuant to the delegated authority of the licensee, such delegation does not relieve the licensee of responsibility for the results achieved, absent a clear and convincing showing of reasonably adequate supervision by the licensee," *The Prattville B/Casting Co.*, 8 RR 2d 120. Bell, Sr. claims he did not even discuss the matter with his son at the time the statement was submitted or for several months thereafter. For a li-

[8] The invoice submitted to the Southland Oil Company in connection with the September, 1972 advertising campaign of the Country Store also constituted a technical violation of Rule 73.1205. However, since all of the parties involved are shown to have been aware of what was being done, the infraction does not rise to the quality of the other violations of the rule. The violation, standing alone, would not warrant any action against the licensee more severe than an admonition to discontinue the practice.

censee to not even question the person most likely to be knowledgeable of the subject of a Commission investigation is the very opposite of reasonably adequate supervision.

44. However, the misrepresentation does not end there. It has been found that time after time Bell, Sr. denied knowledge of the fraudulent billing under circumstances which render those denials impossible of belief. He apparently believed that if he could paint himself as the credulous victim of a wife and son who permitted him to destroy himself through their silence he could escape accountability. The record warrants no such conclusion.

45. This case presents a pattern of deliberate falsehoods to the Commission, its staff and its investigators in an attempt to conceal serious violations of the fraudulent billing rules. The Commission has often explained why such conduct cannot be tolerated and merits the severest sanctions, *The Neighborly B/Casting Co., Inc.*, 24 RR 959; *Nick J. Chaconas*, 21 RR 2d 576. It is concluded that on the misrepresentation issue alone the public interest requires that the license of Sea Island Broadcasting Corporation of S.C. for Station WSIB should be revoked. That conclusion is reinforced by the proof of deliberate, regular fraudulent billing over a prolonged period of time.

Accordingly, IT IS ORDERED, That unless an appeal is taken to the Commission by a party or the Commission reviews the Initial Decision on its own motion in accordance with Rule 1.279,[9] the license of Sea Island Broadcasting Corporation of S.C. for Station WSIB, Beaufort, South Carolina IS REVOKED.

CHESTER F. NAUMOWICZ, JR.
Administrative Law Judge
FEDERAL COMMUNICATIONS COMMISSION

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[9] Under Rule 1.276 appeals in the form of exceptions to the Initial Decision must be filed within 30 days of the public release date of the full text hereof, unless an extension of time is duly granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period, or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 76-1735

SEA ISLAND BROADCASTING CORPORATION OF S.C.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION,

APPEAL FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: ROBINSON; *Circuit Judge,* and RICHEY*, *Judge, United States District Court for the District of Columbia*

Order

Filed Mar 5, 1980

Upon consideration of appellant's (Sea Island Broadcasting Corp. of S.C.) petition for rehearing, it is ORDERED, by the Court, that appellant's aforesaid petition for rehearing is denied.

Per Curiam
For the Court
/s/GEORGE A. FISHER
GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to Title 28 U.S.C. § 292(a). Circuit Judge Leventhal was a member of the panel which heard and decided this case, but died and did not participate in the foregoing order.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1979

No. 76-1735

SEA ISLAND BROADCASTING CORPORATION OF S.C.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Before: WRIGHT, *Chief Judge*, MCGOWAN, TAMM, ROBINSON, MACKINNON, ROBB, WILKEY, WALD, and MIKVA, *Circuit Judges*

Order

Filed Mar 5, 1980

The suggestion for rehearing *en banc* filed by appellant (Sea Island Broadcasting Corp. of S.C.) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is ORDERED, by the Court, that appellant's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
For the Court
/s/GEORGE A. FISHER
GEORGE A. FISHER
Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1977

No. 76-1735

SEA ISLAND BROADCASTING CORPORATION OF S.C., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*

APPEAL FROM AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BEFORE: LEVENTHAL and ROBINSON, *Circuit Judges,* and RICHEY,* *District Judge, United States District Court for the District of Columbia*

Order

Filed Jun 23, 1978

This cause came on to be heard on the record on appeal from the Federal Communications Commission and was argued by counsel. On consideration of the foregoing, it is ORDERED and ADJUDGED by this Court, that the record be remanded to the Federal Communications Commission, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
/s/GEORGE A. FISHER
GEORGE A. FISHER
Clerk

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

No. 76-1735—Sea Island Broadcasting Corp. of S.C.

v.

FCC

MEMORANDUM

The record is remanded to the Federal Communications Commission in order that we may have the views of the Commission, and not merely the submissions of its counsel, concerning the following matters:

(1) What standard of proof was applied in the disposition of this matter by the Commission?

(2) What would be the effect on the public interest if the Commission were to apply a "clear and convincing" standard of proof to issues of fact in license revocation proceedings?

APPENDIX H

BC
FCC 78-841

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of the License of SEA ISLAND BROADCASTING CORPORATION OF S.C. (WSIB) Beaufort, South Carolina	Docket No. 19886

MEMORANDUM OPINION AND ORDER

(Adopted: November 30, 1978; Released: December 11, 1978)

BY THE COMMISSION:

1. In a Decision, 60 FCC 2d 146 (1976), reconsideration denied, 64 FCC 2d 721 (1977), the Commission revoked the license of Sea Island Broadcasting Corporation of S.C. (Sea Island) for Station WSIB, Beaufort, South Carolina. Our decision was based primarily on the fact that Sea Island had shown a classic pattern of making deliberate misrepresentations and other misleading and deceptive statements to us in order to conceal billing practices which violated Section 73.1205 of our Rules. We also determined that the kinds of improper billing practices engaged in by Sea Island were serious and reinforced our conclusion to revoke Sea Island's license. Sea Island appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit, which has remanded the case to us in order to ascertain what standard of proof was applied in this proceeding and to obtain our views concerning the relevant public interest considerations inherent in applying a "clear and convincing" standard of proof to license revocation proceedings held before this agency.

2. On July 7, 1978, Sea Island filed a request that oral argument be held before the Commission or, alternatively, that a schedule be adopted for the filing of Comments and Reply Comments, on the matters for which this case was remanded.[1] It claims that, since only one of the Commissioners who voted in the 1976 Decision revoking Sea Island's license, 60 FCC 2d 146, is still a member of the Commission, it is unlikely the present Commissioners can determine what standard of proof their predecessors used. Further, Sea Island expresses its wish to comment upon a Memorandum Opinion and Order adopted June 28, 1978, in *Radio Carrollton*, FCC 78–444, in which the Commission clarified its position on the standard of proof used in that case. Additionally, concerning the potential effect a "clear and convincing" standard would have on the public interest, Sea Island believes it would be helpful for the Commission to have the views of one who has been the subject of a revocation proceeding. The Broadcast Bureau opposes Sea Island's request. Because our ruling on Sea Island's request is in accord with the Bureau's comments, we shall not recite all of the Bureau's contentions. Rather, the crux of the Bureau's views will be set forth as the bases for our ruling.

3. We do not believe that any useful purpose would be served by allowing the parties in this proceeding to file comments or participate in oral argument before us concerning the questions asked us by the Court of Appeals. The claim that the current Commissioners are unable to determine what standard of proof their predecessors used is without merit. Four of the six Commissioners who voted to deny Sea Island's petition for reconsideration are still members of the Commission. Further, all of the present Commissioners have available the record used by the Commission in its consideration of this matter as well as the transcript of the oral argument held in this case, and also the professional staff members directly involved in the preparation of the Decision.[2] Finally, the question of whether a "clear and convincing"

[1] Sea Island filed a pleading entitled "Notice of Election of Distress Sale and Request for Waiver," on November 21, 1978. Pursuant to Section 402(c) of the Communications Act of 1934, as amended, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction over this proceeding. Although the Court of Appeals has remanded this proceeding to us, it is clear that it has done so only for the purpose of obtaining answers to specific questions posed by the Court and that the Court will give further consideration to the issues raised in Sea Island's appeal in the light of our responses. Under these circumstances, the remand order of the Court must be construed as a very narrow and limited one, which does not relinquish the Court's statutory jurisdiction over this case, and thus we do not believe that we have any authority to rule on the arguments made in Sea Island's instant pleading at this time. See *Folkways Broadcasting Company, Inc.*, 61 FCC 2d 912, at footnote 7 (1976). Accordingly, Sea Island's "Notice of Election of Distress Sale and Request for Waiver" must be viewed as an unauthorized pleading, and it will be dismissed without further consideration.

[2] Moreover, there is no basis for allowing Sea Island to comment on the Commission's statement concerning the standard of proof used in *Radio Carrollton*, *supra*, a case factually unrelated to this proceeding.

standard of proof should be applied in revocation proceedings is a question addressed to the Commission and does not require further comments from the parties.

4. ACCORDINGLY, IT IS ORDERED, That the "Request for Oral Argument, or for Other Relief," filed July 7, 1978, by Sea Island Broadcasting Corporation of S.C. IS DENIED.

5. IT IS FURTHER ORDERED, That the "Notice of Election of Distress Sale and Request for Waiver," filed November 21, 1978, by Sea Island Broadcasting Corporation of S.C. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

APPENDIX I

Title 5, United States Code, Section 556

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record of those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a part is entitled, on timely request, to an opportunity to show the contrary. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 386).

Title 5, United States Code, Section 706

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record of those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393).

Title 47, United States Code, Section 312

§ 312. Administrative sanctions—Revocation of station license or construction permit.

(a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308 of this title;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section;

(6) for violation of section 1304, 1343, or 1464 of Title 18; or

(7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) Case and desist orders.

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe

any of the provisions of this act, or section 1304, 1343, or 1464 of Title 18, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Order to show cause.

Before revoking a license or permit pursuant to subsection (a) of this section, or issuing a cease and desist order pursuant to subsection (b) of this section, the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) Burden of proof.

In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

(e) Procedure for issuance of cease and desist order.

The provisions of section 1008 (b) of Title 5 which apply

with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order. (June 19, 1934, ch. 652, § 312, 48 Stat. 1086; July 16, 1952, ch. 879, § 10, 66 Stat. 716; Sept. 13, 1960, Pub. L. 86-752, § 6, 74 Stat. 893; Feb. 7, 1972, Pub. L. 92-225, § 103(a)(2)(A), 86 Stat. 4).

Former 47 C.F.R. § 73.1205 (1975)

§ 73.1205. Fraudulent billing practices.

No licensee of a standard, FM, or television broadcast station shall knowingly issue to any local, regional or national advertiser, advertising agency, station representative, manufacturer, distributor, jobber, or any other party, any bill, invoice, affidavit or other document which contains false information concerning the amount actually charged by the licensee for the broadcast advertising for which such bill, invoice, affidavit or other document is issued, or which misrepresents the nature or content of such advertising, or which misrepresents the quantity of advertising actually broadcast (number or length of advertising messages) or the time of day or date at which it was broadcast. Licensees shall exercise reasonable diligence to see that their agents and employees do not issue any documents which would violate this section if issued by the licensee.

Note: Commission interpretations in connection with the Rule may be found in a separate Public Notice issued May 18, 1970, entitled "Applicability of Fraudulent Billing rule" (FCC 70-513, 35 F.R. 7906).

(Section was amended effective July 15, 1976. 41 F.R. 20675).

No. 79-1905

Supreme Court, U. S.
FILED
JUL 15 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

SEA ISLAND BROADCASTING CORPORATION OF S.C., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1905

SEA ISLAND BROADCASTING CORPORATION OF S.C., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether the court of appeals erred in affirming a broadcast license revocation order that was based on clear and convincing evidence simply because the Federal Communications Commission had unsuccessfully urged that only a preponderance of the evidence should be required as a general rule.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The report of the Federal Communications Commission on limited remand from the court of appeals (Pet. App. B) is reported at 69 F.C.C. 2d 1796. The Commission's original decision (Pet. App. C) is reported at 60 F.C.C. 2d 146, and its memorandum opinion and order denying reconsideration (Pet. App. D) is reported at 64 F.C.C. 2d 721. The initial decision of the administrative law judge (Pet. App. E) is reported at 61 F.C.C. 2d 937.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1980. A petition for rehearing was denied on March 5, 1980. The petition for a writ of certiorari was filed on June 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 24, 1976, after a full evidentiary hearing, the Federal Communications Commission decided (Pet. App. 19a-30a) to revoke petitioner's license for standard radio station WSIB, Beaufort, South Carolina. The Commission's action was based on evidence establishing that petitioner had violated Commission regulations that prohibit the issuance of any bill "which contains false information concerning the amount actually charged by the licensee for the broadcast advertising * * * or which misrepresents the quantity of advertising actually broadcast * * *." 47 C.F.R. 73.1205. The Commission stated (Pet. App. 30a):

> Our decision to revoke [petitioner's] license is based primarily on the fact that [petitioner] has shown a classic pattern of making deliberate

misrepresentations and other misleading and deceptive statements to us when it believed it could effectively conceal suspected wrongdoing. Further, the kinds of fraudulent billing engaged in by [petitioner] were serious and reinforce our conclusion to revoke [petitioner's] license. In short, the effective regulation of the communications industries under our jurisdiction is premised on our ability to depend on the accuracy and truthfulness of our licensee's representations to us. Once we find that we cannot rely on a licensee's representations to us, the only suitable penalty is revocation of the license.

The evidence showed that petitioner had participated with a local merchant in a scheme to defraud a national advertiser with whom the merchant had a cooperative advertising agreement in 1972. Pursuant to the scheme, petitioner submitted to the national advertiser invoices which did not account for rebates that petitioner had paid to the merchant, and thus overstated the price of the advertising. Because the national advertiser had agreed to pay 50% of the amount invoiced (Pet. App. 21a & n.4), the effect of this scheme was to cause the national advertiser to pay an inflated price for the advertising, to the benefit of petitioner and the merchant. Petitioner also conceded at the hearing that it had issued invoices to national cooperative advertisers, which misrepresented the types of advertising that were broadcast (Pet. App. 21a).

Moreover, the record showed that petitioner had made misrepresentations and misleading statements to the Commission during its investigation. For instance, after the Commission had advised petitioner that it was investigating possible fraudulent billing practices, Charles E. Bell, Sr., petitioner's president and sole shareholder, wrote to the Commission on October 3, 1973, stating that his station's billing practices had been "carefully

reviewed," and that he had been unable to find an explanation from the employee who had made the bookkeeping entries. He further stated that that employee was "not a trained bookkeeper," and he told the Commission that typewritten ledger sheets—rather than the handwritten ledger to which the Broadcast Bureau had referred—were used for billing (Pet. App. 5a, 24a). When Bell later testified, however, he stated that he had sent the October 3rd letter without questioning the bookkeeper (his wife), the sales and station manager (his son), or the merchant whose account had been the subject of the Broadcast Bureau's inquiry. Moreover, he had not inspected the typewritten ledger sheets to which he had referred in his letter (*ibid.*).

2. On June 24, 1976, the Commission entered its revocation order. On May 20, 1977, the Commission denied reconsideration, stating that the record "overwhelmingly supports" the factual findings supporting that order (Pet. App. 19a-30a, 32a). Three months later, while petitioner's appeal was pending in the United States Court of Appeals for the District of Columbia Circuit, that court decided *Collins Securities Corp.* v. *SEC*, 562 F.2d 820 (D.C. Cir. 1977), in which it held that the SEC's revocation of a broker-dealer license must be based on "clear and convincing evidence." Petitioner subsequently argued in its reply brief in the court of appeals (at 11-14) that the court's holding in *Collins* should also govern the revocation of a broadcast license. After oral argument, the court remanded the record for the limited purpose of asking the Commission to state what standard had been applied in deciding petitioner's case, and to advise the court with respect to whether the Commission believed that the *Collins*

standard should be applied in the broadcast license context (Pet. App. 49a-50a).

The Commission thereafter reported its view that broadcast revocation proceedings should be governed by the "preponderance of the evidence" test. The Commission also stated that it had decided petitioner's case under that test but, referring to its earlier conclusion that "the evidence against [petitioner] was overwhelming," the Commission noted that the "clear and convincing" test had been satisfied in any event (Pet. App. 14a & n.3).

The court of appeals held that the Commission's revocation of a broadcast license must be supported by evidence that is "clear and convincing" (Pet. App. 10a). Based on the Commission's representation and the court's own "particularly careful" review of the record, the court of appeals concluded that "the Commission at all times considered the proof of [petitioner's] derelictions to be clear and convincing" (Pet. App. 12a). Therefore the court of appeals affirmed.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the Commission's revocation of petitioner's broadcast license, rather than remanding the case to the Commission. Petitioner bases that contention on the premise that the Commission applied an erroneous standard of proof, which it subsequently defended on appeal. Petitioner's contention lacks merit, however, because the administrative record clearly demonstrates that the Commission viewed the evidence as satisfying the "clear and convincing" standard in any event.

While the Commission argued as a general proposition that revocation proceedings should be governed by a "preponderance" rather than a "clear and convincing" standard of proof, the Commission has consistently taken

the position that the revocation of petitioner's license was warranted under either test. Petitioner claims that the Commission's assertion is supported only by a "gratuitous representation [made] during the process of judicial review" (Pet. 8). On the contrary, the Commission's evaluation of the evidence was unequivocal both when it made its initial determination and when it denied reconsideration, both of which occurred before the court of appeals applied the "clear and convincing" test in the context of broker-dealer license revocations, and before that court indicated by its limited remand order (Pet. App. 49a-50a) that it might impose the same test in the broadcast license revocation context. Prior to the court of appeals' decision in this case, it was not obvious that "clear and convincing" proof was required in these circumstances. It is not surprising, therefore, that the Commission did not specifically state that the evidence supporting the revocation of petitioner's license was "clear and convincing." Nonetheless, the Commission expressly stated in its initial revocation decision that "[t]he record in this proceeding is *replete* with examples of *deliberate* misrepresentations by [petitioner's] owner and officers * * *" (Pet. App. 21a; emphasis added). Moreover, when the Commission denied reconsideration in May 1977, three months before *Collins* was decided, it stated that its conclusions were "*overwhelmingly support*[*ed*]" by the record (Pet. App. 32a; emphasis added). In other words, the administrative record, as it existed before the Commission responded to the court of appeals' questions, could not have demonstrated more clearly that the

Commission believed that the evidence supporting the revocation was sufficient under either test.[1]

As the court of appeals observed, the existence of substantial evidence supporting the agency's revocation decision is "abundantly clear" (Pet. App. 6a-7a). In these circumstances, since petitioner does not and could not claim that it was denied an opportunity to present evidence in its favor or to explain the evidence against it, further administrative proceedings were not required.

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[1]Petitioner's assertion (Pet. 17) that this case should be remanded to the Commission under *Woodby* v. *INS*, 385 U.S. 276 (1966), is ill-founded. Remand was necessary in *Woodby* only because it was not obvious, as it is here, that the evidence satisfied the appropriate standard (*id.* at 279). Because the revocation of petitioner's license was justified under either standard, the suggestion (Pet. 18) that the Court consider this case together with *Steadman* v. *SEC*, cert. granted, No. 79-1266 (Apr. 28, 1980), is likewise without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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